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NEWS & ANALYSIS

Beyond Delegated Authority: The Counterpart Endangered Species Act Consultation Regulations

by Cynthia A. Drew

Editors' Summary: Wildlife agencies entrusted by Congress to administer the ESA have in two recent counterpart regulations revised interagency cooperation procedures in ways that appear to fall short of statutory requirements. Two federal district courts have now ruled in a contradictory manner on the validity of these regulations. Meanwhile the regulations held valid continue to be used to allow action agencies to aggrandize their role in determining whether their projects will be "not likely to adversely affect" protected species—thus receiving no further scrutiny. In this Article, Cynthia A. Drew questions the ultimate legality of the wildlife agencies effecting such intraagency delegations of statutorily required interagency cooperation. Through an analysis of both the challenged regulations and the results of judicial review after citizen plaintiffs sued to invalidate them, she argues that such intraagency delegation practices pass neither statutory nor constitutional muster.

"Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought."

—*Tennessee Valley Authority v. Hill*,
437 U.S. 153 (1978)

I. Introduction

A. Current State of Play: Conflicting Court Decisions Hold Analogous Endangered Species Regulatory Revisions (1) Invalid and (2) Valid

Environmental law is notorious for having some of the most complex legislation and regulations on the books. This complexity arises in part from the need to weave scientific concepts into careful drafting—a task that the U.S. Congress often has little appetite for completing (let alone the expertise to get the job done right). In environmental/natural resources law, Congress has often passed broad legislation, thus choosing to delegate the task of figuring out the details to an agency presumed to have the expertise to fill in the blanks correctly. It is well-settled that an agency promulgat-

ing regulations to fill in the gaps of complex areas of law in this framework has received the congressional imprimatur to get the task done—and that courts will defer to the professional judgment of agencies properly acting under the aegis of unambiguously delegated authority from Congress.¹

This constitutional framework gives rise to the following interesting structural possibility: What happens when Congress is explicit as to the roles Agency Number One and Agency Number Two are to play vis-à-vis each other, but the agencies cooperate to promulgate regulations that interpret away such distinctions? In the name of such "inter-agency cooperation," will courts allow Agency Number One—to which Congress specifically delegated a particularized task within its statutorily designated area of expertise—actively to off-load performance of such mandatory duty to inexpert Agency Number Two? And even if Agency Number One desires to allow Agency Number Two to take over Agency Number One's area of expertise—and so does Agency Number Two, the better arguably to facilitate fulfilling Agency Number Two's very different congressional taskings—will those facts make any difference at all to courts undertaking judicial review of such intraagency aggrandizement and encroachment?

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1. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 14 ELR 20507 (1984) (instructing the lower courts to give no deference to an agency interpretation of a statute it administers that did not follow unambiguously expressed congressional intent (Step One), but to give considerable deference when reviewing an agency's construction of such a statute if Congress apparently delegated broad discretion to the agency to fill gaps in the statutory scheme (Step Two)).

Case law developments suggest different possible answers to this question. The hypothetical of Agency Number One's intraagency delegation to Agency Number Two is no mere "what if" scenario. We find this precise phenomenon operating pursuant to recently promulgated counterpart regulations now being challenged in federal district courts.² The goal of this Article is to provide a roadmap and analysis to navigate the structural problems created by this sort of intraagency delegation in the specific context of the (1) 2003 Endangered Species Act (ESA)³/National Fire Plan (NFP) joint counterpart consultation regulations,⁴ and (2) ESA/Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)⁵ joint counterpart consultation regulations.⁶

The primary agencies promulgating these regulations were the two entrusted by Congress to administer the ESA: (1) the U.S. Fish and Wildlife Service (FWS); and (2) the National Marine Fisheries Service (NMFS).⁷ The wildlife agencies purportedly promulgated the ESA/FIFRA counterpart regulations, for example, to "enhance the efficiency and effectiveness"⁸ of the ESA's interagency cooperation process.⁹

2. Counterpart regulations purport to offer alternative or better means of fulfilling statutorily required duties.

3. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18 (imposing various requirements on both federal agencies and private parties to protect endangered and threatened species).

4. Joint Counterpart Endangered Species Act Section 7 Consultation Regulations, 68 Fed. Reg. 68254 (Dec. 8, 2003) [hereinafter ESA/NFP Counterpart Regulations or Counterpart Consultation Regulations] (codified at 50 C.F.R. §§402.30 to 402.34 (2006)). Approved in 2000, the NFP was an interagency strategy "to reduce risks of catastrophic wildland fires and restore fire-adapted ecosystems." 68 Fed. Reg. at 68254.

5. 7 U.S.C. §§136-136y, ELR STAT. FIFRA §§2-34 (requiring, inter alia, manufacturers of new agricultural chemicals or pesticides to register them with the U.S. Environmental Protection Agency (EPA) before being allowed to produce or sell them publicly).

6. Joint Counterpart Endangered Species Act Section 7 Consultation Regulations, 69 Fed. Reg. 47732 (Aug. 5, 2004) [hereinafter ESA/FIFRA Counterpart Regulations or Counterpart Consultation Regulations] (codified at 50 C.F.R. §§402.42(b), 402.43, and 402.44).

7. See 16 U.S.C. §1532(15) (definition of "Secretary"). The FWS and NOAA Fisheries are hereinafter referred to collectively as "the Services" or the "wildlife agencies" and individually as "Service" or "wildlife agency." The 2004 *Federal Register* notice promulgating the final ESA/FIFRA joint counterpart regulations listed only the Services as the responsible agencies. ESA/FIFRA Counterpart Regulations, 69 Fed. Reg. at 47732. Per the 2003 *Federal Register* notice promulgating the ESA/NFP counterpart regulations, the U.S. Department of Agriculture's Forest Service, the U.S. Department of the Interior's Bureau of Indian Affairs and National Park Service, and the Bureau of Land Management cooperated with the Services in developing the regulations. ESA/NFP Counterpart Regulations, 68 Fed. Reg. at 68254.

8. The ESA/FIFRA counterpart regulations were designed to achieve this goal "by increasing interagency cooperation and providing two optional alternatives for completing section 7 consultation for FIFRA regulatory actions." ESA/FIFRA Counterpart Regulations, 69 Fed. Reg. at 47732. Similarly, the ESA/NFP counterpart regulations were promulgated in 2003 "to enhance the efficiency and effectiveness of the consultation process under section 7 of the ESA for Fire Plan Projects." ESA/NFP Counterpart Regulations, 68 Fed. Reg. at 68254, 68264.

9. See, e.g., 16 U.S.C. §1536(a)(2) [hereinafter ESA §7(a)(2) mandatory duty to avoid jeopardy] ("[All federal agencies] shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species . . .") (emphasis added).

This Article questions the ultimate legality of the agencies themselves acting to affect intraagency delegations of ESA statutorily required interagency cooperation processes for FIFRA and NFP regulatory actions. Through an analysis of first, the challenged regulations, and second, the contradictory results of judicial review after citizen plaintiffs sued to invalidate them, I argue that such intraagency delegation practices pass neither statutory nor constitutional muster.

B. Statutory Background and Context of Challenged Regulatory Revisions

The first federal district court (in *Washington Toxics Coalition v. U.S. Fish & Wildlife Service*)¹⁰ to consider whether challenged provisions of ESA counterpart regulations (in that case, of 2004 ESA/FIFRA regulations) were consistent with the protective mandates of the ESA concluded that some were not. That ruling is on appeal to the U.S. Court of Appeals for the Ninth Circuit.¹¹ A second federal district court (in *Defenders of Wildlife v. Kempthorne*)¹² confronting regulatory challenges to ESA counterpart regulations subsequently upheld challenged provisions of the ESA/NFP regulations—even though these regulations raised the same §7 statutory construction issues as the *Washington Toxics* court had already decided when holding invalid analogous challenged portions of the ESA/FIFRA counterpart regulations.

Further, to complicate the legal landscape regarding issues of ESA statutory construction and regulatory validity, in January 2007, the U.S. Supreme Court took review of consolidated challenges to a Ninth Circuit decision, *Defenders of Wildlife v. U.S. Environmental Protection Agency*.¹³ The *Washington Toxics* court had relied upon *Defenders* as binding circuit court precedent when construing ESA §7 to require that portions of the ESA/FIFRA counterpart consultation regulations be set aside because they exceeded the agency's authority granted by the statute.¹⁴ The Supreme Court took review of different legal issues. Nevertheless, besides the issues initially presented by the petitions,¹⁵ the Court specifically requested that the parties also

10. *Washington Toxics Coalition v. U.S. Fish & Wildlife Serv.*, 457 F. Supp. 2d 1158, 36 ELR 20190 (W.D. Wash. 2006), *appeal docketed*, No. 06-35873 (9th Cir. Oct. 17, 2006) (construing and applying the ESA §7(a)(2) mandatory duty to avoid jeopardy in reaching that result).

11. The Ninth Circuit has set a briefing schedule running from April 23 through July 16, 2007. *Washington Toxics Coalition v. U.S. Fish & Wildlife Serv.*, No. 06-35873 (9th Cir. filed Oct. 17, 2006).

12. *Defenders of Wildlife v. Kempthorne (Kempthorne)*, No. 04-1230(GK), 2006 WL 2844232 (D.D.C. Sept. 29, 2006). The parties in this case are currently briefing attorneys' fees issues.

13. 420 F.3d 946, 35 ELR 20172 (9th Cir. 2005), *cert. granted*, *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 852 (Jan. 5, 2007) (No. 06-340), and *cert. granted*, *EPA v. Defenders of Wildlife*, 127 S. Ct. 853 (Jan. 5, 2007) (No. 06-549) (concluding that EPA erred in deciding that Agency must disregard the impact on endangered and threatened species of its decision to transfer administration of Clean Water Act permitting program to Arizona; vacating transfer decision as arbitrary and capricious, transferring lawsuit to district court, remanding petition for review to Agency).

14. *Washington Toxics*, 457 F. Supp. 2d at 1178 ("[Section 7(a)(2)] makes no legal distinction between the trigger for its requirement that agencies consult with FWS and the trigger for its requirement that agencies shape their actions so as not to jeopardize endangered species . . .") (citing *Defenders*, 420 F.3d at 961).

15. The question presented by EPA's petition, e.g., is: "Does Section 7(a)(2) of Endangered Species Act, 16 U.S.C. §1536(a), which requires each federal agency to insure that its actions do not jeopardize

brief and argue an “additional question.”¹⁶ In answering its own question, the Court might ultimately construe the ESA in a manner affecting counterpart regulations challenges—especially the *Washington Toxics* decision now on appeal to the Ninth Circuit.

How, if at all, may these varying precedents be reconciled? Are the first and/or second ESA counterpart regulations ultra vires? How will the two district courts’ differing choices of the applicable standards for judicial review of agency action per *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁷ affect the answer to that question and the authority of these precedents for future cases and/or for the wildlife agencies’ ESA program management? The *Washington Toxics* court resolved the ESA §7 statutory construction issues before it partly at the *Chevron* Step One level. The *Kempthorne* court resolved the same ESA statutory construction issue at the *Chevron* Step Two level.

The Supreme Court’s specific request that the parties now before it also brief whether the agency action at issue in the Ninth Circuit’s *Defenders* case was arbitrary and capricious may ultimately presage the Court’s undertaking its own *Chevron* analysis of ESA §7.¹⁸ Is the Supreme Court’s disposition of the Ninth Circuit *Defenders* case likely to affect the disposition of ESA counterpart regulations cases? Or might the Court more likely instead decide the *Defenders* issues presented—as the Court’s own additional question suggests it might—in a manner offering new instruction to lower courts regarding the appropriate limits of their Administrative Procedure Act (APA) remedial remand authority?¹⁹

continued existence of listed species or modify its critical habitat, override statutory mandates or constraints placed on agency’s discretion by other acts of Congress?” *EPA v. Defenders of Wildlife*, 127 S. Ct. 853 (Jan. 5, 2007) (No. 06-549). See *infra* note 203.

16. That additional question began: “Whether the court of appeals correctly held that the Environmental Protection Agency’s decision to transfer pollution permitting authority to Arizona under the Clean Water Act . . . was arbitrary and capricious because it was based on inconsistent interpretations of Section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. §1536(a)(2) . . .” *EPA v. Defenders of Wildlife*, 127 S. Ct. 853 (Jan. 5, 2007) (No. 06-549). See *infra* note 19.
17. 467 U.S. 837, 14 ELR 20507 (1984). *Chevron* established a two-step analysis to determine when judicial deference is due to an agency’s construction of a statute that it administers: “If the intent of Congress is clear, that is the end of the matter [Step One]. . . . If, however, . . . the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute [Step Two].” *Id.* See also Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2077 (Dec. 1990) (“*Chevron* applies only in cases of congressional delegation of law-making authority”); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 836 (2001) (the conclusion that *Chevron* “rests on an implied delegation from Congress” means that Congress “has ultimate authority over the scope of the *Chevron* doctrine, and that the courts should attend carefully to the signals Congress sends about its interpretive value”).
18. See 5 U.S.C. §706(2), available in ELR STAT. ADMIN. PROC. (“The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious . . .”).
19. See various cites *supra* note 16. The second part of the Court’s additional question was, “and, if so [i.e., if the Agency’s decision was arbitrary and capricious because it was based on inconsistent interpretations of ESA §7(a)(2)], whether the court of appeals should have remanded to [EPA] for further proceedings without ruling on the interpretation of Section 7(a)(2).” Cf. 5 U.S.C. §706(2) (“The reviewing court shall . . . hold unlawful and set aside agency action, find-

Part I of this Article briefly discusses the existing ESA and FIFRA statutory structures regarding implementation of which—in promulgating the second ESA counterpart regulations—the wildlife agencies sought an “enhance[d] efficiency and effectiveness” in the regulations now invalidated by the *Washington Toxics* court.²⁰ Part II analyzes the scope and consequences of the recent changes wrought to long-standing ESA §7 interagency consultation processes²¹ by both the ESA/NFP and the ESA/FIFRA counterpart regulations. Part III analyzes the disparate results of the first two federal district court challenges to the validity of these first two ESA counterpart regulations promulgated to “fine-tune”²² or “streamline”²³ the only prior ESA §7 interagency consultation processes. Part IV analyzes the bedrock delegation and statutory construction issues that are the key to construing properly the mandates Congress gave both the wildlife agencies and the action agencies in ESA §7.

Part V concludes—despite agency arguments and the *Kempthorne* district court’s statutory construction to the contrary—that portions of both sets of challenged ESA counterpart regulations impermissibly weaken required statutory protections. Moreover, the statutory authority on which the regulations are claimed to be based cannot support their promulgation without affecting an unauthorized intraagency delegation of mandates Congress explicitly gave only to the wildlife agencies. The regulations are therefore ultra vires. The portions held invalid by the *Washington Toxics* court should be formally rescinded. In promulgating them, executive agencies unconstitutionally exceeded “the bounds established by Congress.”²⁴

II. Relevant Statutory Mandates

The wildlife agencies promulgated the ESA/FIFRA counterpart regulations invalidated by the *Washington Toxics* court to reconcile intrinsically different statutory mandates. In FIFRA, Congress delegated U.S. Environmental Protection Agency (EPA) authority to implement its pesticide registration program responsibilities in a manner affording a range of agency discretion to balance both economic and environmental factors.²⁵ In the ESA, Congress authorized little such²⁶ agency discretion.²⁷ Ever since the Supreme

ings, and conclusions found to be—(A) . . . otherwise not in accordance with law; . . . (C) in excess of statutory jurisdiction, authority, or limitations . . . ; (D) without observance of procedure required by law . . .”). See *infra* note 203.

20. ESA/FIFRA Counterpart Regulations, 69 Fed. Reg. at 47732.
21. I.e., to the long-standing regulatory processes that all federal agencies had previously been required to use to fulfill their ESA §7(a)(2) mandatory duty to avoid jeopardy.
22. ESA/FIFRA Counterpart Regulations, 69 Fed. Reg. at 47732, 47733.
23. ESA/NFP Counterpart Regulations, 68 Fed. Reg. at 68254.
24. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 n.*, 13 ELR 20672 (1983) (Rehnquist, J., dissenting). In the final footnote of his dissent, Justice Rehnquist asserted: “Of course, a new administration may not refuse to enforce laws of which it does not approve, or to ignore statutory standards in carrying out its regulatory functions.” *Id.* at 59 n.*.
25. See, e.g., 7 U.S.C. §136(bb) (“[FIFRA’s definition of] unreasonable adverse effects on the environment means any unreasonable risk to [the human race] or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide . . .”).
26. But see 16 U.S.C. §1533(b)(2) (“The Secretary shall designate critical habitat . . . on the basis of the best scientific data available and af-

Court's watershed decision in *Tennessee Valley Authority v. Hill (TVA)*,²⁸ courts have construed challenged ESA provisions strictly²⁹—and protectively.³⁰ Because it affords such strong environmental protection,³¹ the ESA has aptly been characterized as the “pit bull” of environmental statutes.³² Enhancing efficiency and effectiveness may in the abstract be a laudable program goal for federal agencies striving to implement statutory mandates. Nevertheless, the delegated flexibility that EPA may have to achieve such a goal by balancing aspects of its FIFRA program responsibilities is likely to be significantly greater than any the Services have to do so by balancing aspects of their ESA program responsibilities.

A. Relevant General Requirements of the ESA

The Supreme Court opined that the ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”³³ It im-

ter taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat . . .”).

27. See *supra* note 9 and accompanying text; see also 15 U.S.C. §1546(a)(1) [hereinafter ESA §7(a)(1) mandatory duty to utilize authorities for conservation] (“[All Federal agencies] shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of [ESA] by carrying out programs for . . . conservation of endangered species and threatened species”).
28. 437 U.S. 153, 8 ELR 20513 (1978) (holding that ESA prevented TVA from operating virtually completed dam because its operation would either destroy the endangered snail darter or its critical habitat—even though Congress had continued to appropriate millions of dollars to complete dam after congressional appropriations committees had learned that an endangered species was present).
29. See also *Forest Guardians v. Babbitt*, 174 F.3d 1178, 29 ELR 20351 (10th Cir. 1999) (holding that Secretary of the Interior would be compelled to perform nondiscretionary duty mandated by ESA to designate critical habitat for endangered minnow, notwithstanding claimed resource limitations and impossibility of compliance due to previous moratorium on spending and insufficient monetary allocations since moratorium expired; also finding that such defenses could be raised only in contempt proceedings for alleged noncompliance with injunction).
30. See, e.g., *TVA*, 437 U.S. at 194 (“Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as ‘institutionalized caution.’”).
31. Although the post-*TVA* 1979 ESA Amendments “softened the obligation on an agency from requiring the agency to ‘insure’ the species would not be jeopardized to requiring the agency to ‘insure’ that jeopardy is not ‘likely,’” Congress’ “legislative intent” in those amendments was that ESA “continues to give the benefit of the doubt to the species.” *Roosevelt Campobello Int’l Park Comm’n v. EPA*, 684 F.2d 1041, 1048, 12 ELR 20911 (1st Cir. 1982) (citing Pub. L. No. 96-159, §4(1)(C), 93 Stat. 1225, 1226 (1979), H.R. REP. NO. 96-697 (Conf. Rep.), reprinted in 1979 U.S.C.A.N. 2557, 2572, 2576)).
32. See, e.g., Nathan Baker, *Water, Water, Everywhere, and at Last a Drop for Salmon?* NRDC v. *Houston Herald’s New Prospects Under Section 7 of the Endangered Species Act*, 29 ENV’T. L. 607, 613 (Fall 1999) (quoting Donald Barry, Assistant Secretary for Fish, Wildlife, and Parks, U.S. Department of the Interior (DOI)).
33. *Babbitt v. Sweet Home Chapter of Communities for a Greater Or.*, 515 U.S. 687, 703-04, 25 ELR 21194 (1995) (quoting *TVA*, 437 U.S. at 180). ESA defines “endangered species” as “any species which is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. §1532(6). ESA defines “threatened species” as “any species which is likely to become endangered within the foreseeable future throughout all or a significant portion of its range.” *Id.* §1532(20).

poses duties upon both governmental and private parties,³⁴ including “substantial and continuing obligations on federal agencies.”³⁵ There are “no exemptions in [the ESA] for federal agencies. . . .”³⁶

In relevant part, in order to promote the recovery of species in danger of or threatened with extinction, Congress required all federal agencies, “in consultation and with the assistance of the Secretary [i.e., of the appropriate Service],”³⁷ to perform two duties:

(1) to “utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species”³⁸; and

(2) to “[e]nsure that any action authorized, funded, or carried out by [each] agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical. . . .”³⁹

Congress further mandated that after initiating required §7(a)(2) consultation, the action agency and the permit or license applicant “shall not make any irreversible or irretrievable commitment of resources with respect to the agency ac-

34. See *id.* §1536(a) (establishing that all federal agencies must, in consultation with the Secretary, fulfill both their ESA §7(a)(1) mandatory duty to utilize authorities for conservation and their ESA §7(a)(2) mandatory duty to avoid jeopardy). ESA §4 requires the Secretary to determine whether any species is endangered or threatened and to designate critical habitat for such “listed” species. 16 U.S.C. §1533. ESA §9 broadly prohibits acts by any person that harm protected species. 16 U.S.C. §1538. ESA provides for both civil and criminal penalties, *id.* §1540(a)-(b), and for citizen suits, *id.* §1540(g). See *infra* Part III.A. and note 89.
35. *Defenders of Wildlife v. Administrator*, 882 F.2d 1294, 19 ELR 21440 (8th Cir. 1989) (holding that EPA’s regulatory registration of strychnine under FIFRA could violate ESA by “taking” protected species that fed on poisoned carcasses, even though other persons actually used the strychnine for animal control).
36. *TVA*, 437 U.S. at 188 (“[ESA] §10, 16 U.S.C. §1539, create[d] a number of limited ‘hardship exemptions’ [to full statutory compliance], none of which [applied to federal agencies] . . . [Thus,] ‘under the maxim *expressio unius est exclusio alterius*, we must presume that these were the only ‘hardship cases’ Congress intended to exempt.”).
37. ESA §3(15) defines the term “Secretary” as “the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970 . . .” 16 U.S.C. §1532(15). The only definitional exception Congress made to this designation of ESA program responsibility to the Secretaries of the Interior and Commerce was “with respect to the enforcement of the provisions of this chapter and the Convention which pertain to the importation or exportation of terrestrial plants.” *Id.* “Secretary” in only that respect “also means” the “Secretary of Agriculture.” *Id.*
38. *Id.* §1536(a)(1); see also *id.* §1532(3) (“The terms ‘conserve,’ ‘conserving,’ and ‘conservation’ mean to use and the use of *all* methods and procedures which are necessary to bring *any* endangered species or threatened species to the point at which the measures provided pursuant to [ESA] are no longer necessary.”).
39. *Id.* §1536(a)(2). The most notable ESA §7(a)(2) “avoid jeopardy” case is of course *TVA*. See also 16 U.S.C. §1536(a)(4).

Each Federal agency shall confer with the [appropriate] Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed [as endangered or threatened] or result in the destruction or adverse modification of critical habitat proposed to be designated for such species.

Id.

tion which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measure which would not violate subsection (a)(2). . . .”⁴⁰

The statutorily required act of interagency consultation is thus the means established by Congress that all federal agencies must use⁴¹ when acting to fulfill their “primary missions,”⁴² to ensure that they also fulfill both of their substantive ESA §7 obligations⁴³: (1) their §7(a)(1) mandatory duty to utilize their authorities for “conservation”⁴⁴ of protected species; and (2) their §7(a)(2) mandatory duty to avoid jeopardy⁴⁵ to the “continued existence” of protected species.⁴⁶ Although a federal agency may also be acting to fulfill concomitant responsibilities under another statute, courts have concluded that the agency must still comply with the ESA.⁴⁷ Courts have upheld agencies’ utilizing their

authorities to further ESA purposes against even constitutional claims.⁴⁸

B. Relevant General Requirements of FIFRA

EPA administers FIFRA’s comprehensive program regulating registration⁴⁹ and use of pesticides⁵⁰ throughout the country, even those used wholly intrastate.⁵¹ EPA must register a pesticide if, when considered with appropriate restrictions (and other conditions not relevant here), “it will perform its intended function without unreasonable adverse effects on the environment,” and, “when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.”⁵² FIFRA defines “environment” to include “water, air, land, and all plants and [the human race] and

40. *Id.* §1536(d); *accord* Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1127, 28 ELR 21368 (9th Cir. 1998) (holding when Bureau of Reclamation may not execute water service contracts that constitute irreversible and irretrievable commitment of resources during formal consultation process under ESA, Bureau’s failures to follow ESA procedure (by engaging in Agency action under ESA before Service issued biological opinion (BO)) cannot be corrected with post-hoc assessments; affirming the district court’s decision to rescind water service contracts even where Service ultimately issued “no jeopardy” BO).

41. *Houston*, 143 F.3d at 1127 (explaining that the Bureau had affirmative duty to ensure that its actions do not jeopardize endangered species, and agency had clear legal obligation to request formal consultation where the appropriate Service disagreed with agency’s determination of no adverse impact, even if Service took position that formal consultation was unnecessary).

42. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 154, 8 ELR 20513 (1978).

43. Since *TVA*, periodic substantive amendments have somewhat adjusted, but not substantially altered, the breadth and reach of ESA as described by the Court in *TVA* and *Sweet Home* Courts. *See supra* text accompanying note 31. For example, in 1978 Congress authorized a Cabinet-level committee (popularly called the “God squad”) to convene in exceptional circumstances to grant exemptions from §7’s ban on federal actions that jeopardize species. Act of Nov. 10, 1978, Pub. L. No. 95-632, 92 Stat. 3751 (1978) (codified as amended at 16 U.S.C. §1536(e)-(h) (2000)). Nevertheless, the God squad has rarely been convened, and, when convened, has issued no significant exemptions to the §7 ban. *See, e.g.,* MICHAEL BEAN & MELANIE ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 264 (3d ed. 1997).

44. *See supra* note 27; *see also* Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257, 262, 14 ELR 20797 (9th Cir. 1984) (affirming district court’s holding that Secretary of the Interior properly fulfilled ESA §7(a)(1) duty to conserve species in deciding not to sell reclamation project’s water until listed species no longer needed protection).

45. *See supra* note 9, 34 and accompanying text; *see also* *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 15 ELR 20333 (10th Cir. 1985) (stating that “[ESA] imposes on agencies a mandatory obligation to consider the environmental impacts of the projects they authorize or fund” and affirming district court’s decision dismissing plaintiffs’ complaint that the U.S. Army Corps of Engineers wrongfully required them to apply for individual permit (rather than more generic nationwide permit)). The court concluded that the record supported Agency’s finding that proposed discharge may adversely modify critical habitat of whooping cranes. *Id.*

46. Agencies must also consult with the Secretary before taking any Agency action “at the request of, and in cooperation with,” a prospective permit or license applicant who “has reason to believe” that a protected species “may be present in the area affected by his project and that implementation of such action will likely affect such species.” 16 U.S.C. §1536(a)(3).

47. *See, e.g.,* *Washington Toxics Coalition v. EPA*, 413 F.3d 1024, 35 ELR 20138 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1024 (2006) (affirming suspension of pesticide regulation because FIFRA did not relieve EPA of its obligation to comply with ESA); *Defenders of Wildlife v. Administrator*, 882 F.2d 1294, 19 ELR 21440 (8th Cir.

1989) (continued registration of strychnine pesticide effected “taking” of endangered species); *Center for Biological Diversity v. Leavitt*, No. C-02-01580JSW, 2005 WL 2277030, 35 ELR 20190 (N.D. Cal. Sept. 19, 2005) (finding that EPA violated ESA §7 by not initiating consultation with FWS regarding potential effects of pesticides registered with EPA on red-legged frog); *accord* *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 31 ELR 20535 (9th Cir. 2001) (holding that compliance of herbicide with FIFRA did not obviate need for Clean Water Act (CWA) permit); *Aluminum Co. of Am. v. Bonneville Power Admin.*, 175 F.3d 1156 (9th Cir. 1999) (finding agency’s action in adopting measures recommended by appropriate Service to avoid jeopardy to continued existence of salmon in Columbia River Basin was not improper balancing of ESA obligations with Northwest Power Act’s requirement that Pacific Northwest be assured of adequate, efficient, economical, and reliable power supply; that statute did not supplant Agency’s obligation to comply with ESA mandates); *Conservation Law Found. of New England v. Andrus*, 623 F.2d 712, 715, 10 ELR 20067 (1st Cir. 1979) (holding ESA applied “of its own force” to actions of Secretary taken under Outer Continental Shelf Lands Act). *But cf. supra* notes 15, 16, 19 (quoting questions currently under Supreme Court review in the Ninth Circuit’s *Defenders* case).

48. *See, e.g.,* *United States v. Kepler*, 531 F.2d 796, 6 ELR 20340 (6th Cir. 1976) (finding EPA’s regulation of sale or transportation of protected wildlife is permissible, and does not effect taking of property in violation of U.S. Constitution, Amendment 5); *United States v. Billie*, 667 F. Supp. 1485, 18 ELR 20209 (S.D. Fla. 1987) (holding ESA’s ban against “taking” Florida panther did not impose unconstitutional burden on Seminole Indian’s free exercise rights, where use of panther parts was not essential to practice of religion).

49. Originally enacted in 1947, FIFRA now defines “registration” also to include “re-registration.” 7 U.S.C. §136(z). The FIFRA Amendments of 1988, Pub. L. No. 100-532, 102 Stat. 2654 (1988) (codified as amended in scattered sections of 7 U.S.C.), added the requirement that EPA reregister pesticides containing active ingredients first registered before November 1, 1984, under present standards. *See, e.g.,* 7 U.S.C. §136a-1. In the Federal Quality Protection Act (FQPA) of 1996, Pub. L. No. 104-170, 110 Stat. 1489 (1996), Congress set further deadlines for EPA to review all existing tolerances for pesticide chemical residues, against the new standard set forth therein. *See* 21 U.S.C. §346a(q). Even parties in cases challenging EPA’s actions under the FIFRA program, e.g., the *Washington Toxics* plaintiffs, did not dispute that “EPA is faced with a task of gargantuan proportions.” *Washington Toxics Coalition v. U.S. Fish & Wildlife Serv.*, 457 F. Supp. 2d 1158, 1164 36 ELR 20190 (W.D. Wash. 2006).

50. FIFRA defines “pesticides” broadly. *See* 7 U.S.C. §136(u). A registered pesticide is comprised of one or more active ingredients. *See id.* §136(a) (further defining active ingredient).

51. No person in any state may distribute or sell any pesticide not registered or exempted pursuant to FIFRA. *Id.* §136a(a). To the extent “necessary to prevent unreasonable adverse effects on the environment,” FIFRA also authorizes EPA by regulation to “limit the distribution, sale, or use in any State of any pesticide” that is not registered or exempted under FIFRA. *Id.* No person may “use any registered pesticide in a manner inconsistent with its labeling.” *Id.* §136j(a)(2)(G) (2000).

52. *Id.* §136a(c)(5)(C)-(D).

other animals living therein, and the interrelationships that exist among these.”⁵³

In FIFRA, Congress defined “unreasonable adverse effects on the environment”—an EPA finding of which could prevent registration⁵⁴—as “any unreasonable risk to [the human race] or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide.”⁵⁵ Congress explicitly defined both “protect health and the environment” and “protection of health and the environment” to mean “protection against any unreasonable adverse effects on the environment.”⁵⁶ Congress established the FIFRA program subject to continuing EPA regulatory oversight of registered pesticides.⁵⁷

In FIFRA, Congress granted EPA⁵⁸ considerable discretionary authority over registered pesticides.⁵⁹ For example, although FIFRA generally prohibits commerce in unregistered pesticides, Congress delegated the EPA Administrator discretion to permit continued sale and use of existing stocks of pesticides for which EPA has cancelled registrations provided “[s]/he determines that such sale or use is not inconsistent with” FIFRA’s purposes and “will not have unreasonable adverse effects on the environment.”⁶⁰ Congress granted the EPA Administrator broad discretion to “exempt any Federal or State agency from *any* provision” of FIFRA if the Administrator determined “that emergency conditions exist which require such exemption.”⁶¹ Congress also gave the Administrator the power to cancel a pesticide’s

registration⁶² if the pesticide is found generally to cause “unreasonable adverse effects on the environment.”⁶³

Congress granted the Administrator the concomitant power to suspend a registration immediately if s/he determines that it is “necessary to prevent an imminent hazard” pending completion of the cancellation process.⁶⁴ Congress specifically established “unreasonable” hazards “to the survival” of protected species as a triggering criteria under FIFRA, explicitly defining “imminent hazard” as existing when *either*

(1) “the continued use of a pesticide during the time required for cancellation proceeding would be likely to result in unreasonable adverse effects on the environment,” or

(2) “will involve unreasonable hazard to the survival of a species declared endangered or threatened by the Secretary pursuant to the Endangered Species Act of 1973.”⁶⁵

Congress therefore specified that such environmental harm/species protection concerns may prove dispositive as to whether a pesticide *may* be registered for general or restricted use under FIFRA.⁶⁶ Accordingly, the only pesticides that per FIFRA Congress allowed to be registered for general use are those that do not “generally cause unreasonable adverse effects on the environment.”⁶⁷ In FIFRA, Congress additionally required EPA to classify a pesticide for restricted use when “it may generally cause, without additional regulatory restrictions, unreasonable adverse effects to the environment.”⁶⁸

Even the plain meaning of FIFRA’s statutory language establishing the mechanisms for balancing the risks and benefits of pesticide registration (the determination of which Congress has delegated to the EPA Administrator) incorpo-

53. *Id.* §136(j).

54. *See, e.g.,* Dithiocarbamate Task Force v. EPA, 98 F.3d 1394, 1401, 27 ELR 20224 (D.C. Cir. 1996) (“[H]azards from the proper use of such chemicals might justify a ban under FIFRA.”) (citing 7 U.S.C. §136a(c)(5)(D) as requiring as “predicate” to Agency’s authority to register pesticides an Agency determination that “when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment”).

55. 7 U.S.C. §136(bb)(1).

56. *Id.* §136(x). This latter provision was added in the environmentally protective FIFRA amendments of 1972; *see also* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 14 ELR 20539 (1984) (noting that Congress’ extensive 1972 revision of FIFRA transformed the Act from a labeling law to a “comprehensive regulatory statute”).

57. *See generally* 7 U.S.C. §136d (establishing a statutory sunset provision requiring EPA to cancel a pesticide’s registration after the first five years in which it has been effective—and, if renewed, at subsequent five-year intervals—“unless the registrant, or other interested person with the concurrence of the registrant . . . requests . . . that the registration be continued in effect”).

58. The 1972 Amendments transferred responsibility for administering FIFRA from the U.S. Department of Agriculture to EPA. S. REP. NO. 92-838, reprinted in 1972 U.S.C.C.A.N. 4032-33.

59. *See, e.g.,* Wellford v. Ruckelshaus, 439 F.2d 598, 601, 1 ELR 20065 (D.C. Cir. 1971) (stating that within broad limits, FIFRA grants EPA Administrator latitude not only to find facts in required proceeding, but also to set policy in the public interest; it is particularly appropriate for court to defer to Administrator’s exercise of such discretion when matter at issue is interim relief pending decision on registration cancellation).

60. 7 U.S.C. §136d(a)(1); *see also id.* §136p (emphasis added) (specifying “emergency” conditions under which EPA Administrator could exempt a pesticide from FIFRA’s registration requirements; however in determining whether or not such emergency conditions exist, the Administrator “shall consult with the Secretary of Agriculture and the Governor of any state concerned if the request such a determination”).

61. 7 U.S.C. §136p (emphasis added). Pursuant to the regulations, the four main types of exemptions are specific, quarantine, public health, and crisis exemptions. 40 C.F.R. pt. 166.2 (2006).

62. *See also* McGill v. EPA, 593 F.2d 631, 635, 9 ELR 20271 (1979) (construing 7 U.S.C. §136d(b) and noting that Congress’ 1972 FIFRA revisions were both “aimed at increasing the EPA’s ability to protect the environment” and “designed to assure that the economic interest of farmers and other consumers would be fully considered before any pesticide was withdrawn from the market”).

63. 7 U.S.C. §136d(b) (emphasis added); *see also* Environmental Defense Fund v. EPA, 510 F.2d 1292, 1305, 5 ELR 20243 (1975) (affirming EPA’s suspension order because there was adequate evidentiary basis for EPA’s finding that aldrin/dieldrin presented an imminent hazard during the time required for cancellation and remanding issue of whether to exempt existing stocks of the pesticides). *See supra* notes 51, 54.

64. 7 U.S.C. §136d(c).

65. *Id.* §136(l).

66. *See id.* §136a(d)(1)(B)-(C); *see also* Montana Pole & Treating Plant v. I.F. Laucks & Co., 775 F. Supp. 1339, 1343 (D. Montana 1991), *aff’d*, 993 F.2d 676, 23 ELR 20843 (9th Cir. 1993) (“Under FIFRA, the EPA is required to register a pesticide if it determines (1) the pesticide’s labeling and other materials comply with FIFRA’s requirements; and (2) the pesticide, when used properly will perform its intended purpose *without* unreasonable adverse effects on the environment.”).

67. 7 U.S.C. §136a(d)(1)(B).

68. *Id.* §136a(d)(1)(C); *see also* Ciba-Geigy Corp. v. EPA, 874 F.2d 277, 280, 16 ELR 21281 (5th Cir. 1989) (vacating order canceling registration of diazinon for use on golf courses and sod farms; remanding to Administrator to apply correct legal standard per court’s construction of “generally” as “requir[ing] the Administrator to determine that the use of a pesticide in a particular application creates unreasonable risks, though not necessarily actual adverse consequences, with considerable frequency, and thus requires the Administrator to consider whether he has defined the application he intends to prohibit sufficiently narrowly”).

rates a significant measure of and weighting toward environmental factors. Certainly FIFRA does not exempt EPA from complying with all relevant ESA requirements when registering or reregistering pesticides.⁶⁹ To the contrary, in FIFRA Congress explicitly instructed EPA—in fulfilling particularized mandated responsibilities both to register and to cancel registration of pesticides—also to consider in its analysis underlying all such agency actions any “*unreasonable hazard to the survival of a species declared endangered or threatened*” under the ESA.⁷⁰

III. Comparative Process Analysis: Existing and Revised ESA §7 Consultation Procedures

Congress never used the term “counterpart regulations” in either the ESA or FIFRA. The first ESA regulations promulgated in 1978, 50 C.F.R. §402.04, provided the initial regulatory reference to this term—as well as the initial notice that the Services might in future promulgate alternative consultation procedures.⁷¹ The wildlife agencies have to date established counterpart regulations offering NFP and FIFRA action agencies alternative ways of satisfying two statutorily required duties: (1) their ESA §7 procedural duty to consult with wildlife agencies that is also (2) the statutorily required means enabling action agencies to fulfill their ESA §7 substantive duty to ensure no jeopardy to protected species.

The 2003 ESA/NFP⁷² and the 2004 ESA/FIFRA⁷³ regulatory revisions were the first joint counterpart ESA §7 con-

sultation regulations ever promulgated. According to the Preamble to the 1986 regulations (implementing ESA §7), counterpart regulations “must retain the overall degree of protection afforded listed species required” by the ESA and the regulations.⁷⁴

Charts A-D given in the Appendix graphically depict flow charts of ESA §7 existing and revised counterpart consultation procedures.⁷⁵ The revisions made by the ESA/NFP and the ESA/FIFRA counterpart regulations to the existing consultation procedures are analyzed immediately below. The contradictory results of recent judicial review resolving challenges to the counterpart revisions are analyzed in Part IV below.⁷⁶

A. Statutorily Required Consultation Procedures

The ESA itself explicitly establishes extensive processes as a means to require sufficient action agency consultation with the expert wildlife agencies to ensure that the former satisfy their mandatory §7(a)(2) duty to avoid jeopardy to protected species. These statutorily required procedures must be met by every agency—and cannot constitutionally be revised by the wildlife agencies by promulgating new regulations.⁷⁷

To “facilitate” compliance with ESA §7, Congress required “each Federal agency” to “request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of proposed construc-

69. *Defenders of Wildlife v. Administrator*, 882 F.2d 1294, 1299, 19 ELR 21440 (8th Cir. 1989) (“[A] pesticide registration that runs against the clear mandates of the ESA will most likely cause an unreasonable adverse effect on the environment under FIFRA.”). Pursuant to *Defenders of Wildlife*, EPA’s FIFRA regulations allow EPA to conduct a special review of pesticide use, and explicitly provide for such when either a pesticide may “pose a risk to the continued existence” of any endangered or threatened species under the ESA or may “result in the destruction or other adverse modification of any habitat designated” under the ESA as critical habitat. *Id.* (citing 40 C.F.R. §154.7(a)); see also *supra* notes 35, 47.

70. 7 U.S.C. §136(l) (specifying circumstances of “imminent hazard” sufficient to justify Administrator’s discretionary cancellation of pesticide registration as “situation” likely to involve such “unreasonable hazard”) (emphasis added); see also *Ciba-Geigy*, 874 F.2d at 280 (construing FIFRA’s cancellation section as granting EPA Administrator discretionary authority to decide if recurring bird kills that do not significantly reduce bird population are nonetheless unreasonable environmental effect). See *supra* note 68.

71. 50 C.F.R. §402.04 (“The consultation procedures set forth in this part may be superseded for a particular Federal agency by joint counterpart regulations among that Agency, the Fish and Wildlife Service, and the National Marine Fisheries Service . . .”). The only other requirement for counterpart regulations established by §402.04 was that they be published in the *Federal Register* as proposed regulations and “shall be subject to public comment for at least 60 days before final rules are published.” *Id.*

72. The first regulatory context in which the term “counterpart regulations” appears with reference to the National Fire Plan is in the Services’ proposed Joint Counterpart Endangered Species Act Section 7 Consultation Regulations, which notices “joint counterpart regulations . . . to streamline [ESA] consultation on proposed projects that support the National Fire Plan.” Joint Counterpart ESA §7 Consultation Regulations, 68 Fed. Reg. 33806 (June 5, 2003) (codified at 50 C.F.R. §§402.30-402.34).

73. The first regulatory context in which the term “counterpart regulations” appears with reference to the ESA and FIFRA is the following provision in EPA’s notice of proposed field implementation approach and request for comment for the Endangered Species Protection Program: “[T]hese regulations (50 C.F.R. part 402) allow Federal agencies to establish alternate procedures, applicable to specific Federal programs, for satisfying the provisions of ESA §7(a)(2).

Those alternate procedures are known as counterpart regulations.” Endangered Species Protection Program Field Implementation, 67 Fed. Reg. 71549 (proposed Dec. 2, 2002).

74. ESA/NFP Counterpart Regulations, 68 Fed. Reg. at 68254, 68262.

75. The wildlife agencies issued these regulations pursuant to Congress’ broad grant of authority to the Secretary to “promulgate such regulations as may be appropriate to enforce this chapter . . .” 16 U.S.C. §1540(f). The Court’s last significant post-*Chevron* case further construing applicable standards for judicial review of agency action was *United States v. Mead Corp.*, 533 U.S. 218 (2001) (finding that tariff ruling was not entitled to *Chevron* deference, but may be entitled to lesser degree of *Skidmore* deference depending on degree of its persuasiveness). In *Mead*, the Court “assume[d] generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force, noting that “the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.” Cf. Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807 (Spring 2002) (“[The *Mead* majority] was on the right track in holding that the key to the scope of *Chevron* is whether Congress has delegated authority to an agency to make rules with the force of law, and the agency has exercised that authority”); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191-92 (Apr. 2006) (although arguing in post-*Mead* analysis for the need for additional “initial inquiry into whether the *Chevron* framework applies at all,” concluding that “courts should increase their willingness to use the *Chevron* framework whenever the agency has authoritatively answered a question about the meaning of a statute that it has been asked to administer”). Like EPA’s Clean Air Act regulations at issue in *Chevron* itself, the disputed ESA counterpart regulations are products of notice-and-comment rulemaking and purport to provide an authoritative answer about the meaning of such a statute. The proper delegation/deference inquiry thus proceeds—as undertaken by both the *Washington Toxics* and the *Kempthorne* courts—pursuant to *Chevron*, not *Mead*.

76. See *supra* notes 10-19 and accompanying text.

77. See, e.g., *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 n.*, 13 ELR 20672 (1983) (Rehnquist, J., dissenting) (“[A] new administration may not . . . ignore statutory standards in carrying out its regulatory functions.”).

tion action.”⁷⁸ If, “based on the best scientific and commercial data available,” the Secretary “advises” the action agency that such species “may be” present, the agency must conduct a biological assessment for the “purpose of identifying any endangered species or threatened species which is likely to be affected by the action.”⁷⁹

If an action agency determines that a proposed action may adversely affect a listed species,⁸⁰ Congress required the agency to initiate formal consultation with the Secretary.⁸¹ After such consultation, the wildlife agency must prepare and issue to the action agency a biological opinion (BO) explaining how the proposed action will affect the species or its habitat.⁸² If the wildlife agency concludes that the agency’s proposed action will cause jeopardy to the species or destroy or adversely modify critical habitat, the wildlife agency must also establish any reasonable and prudent alternatives (RPAs) that it believes will avoid such consequences.⁸³

If the wildlife agency concludes in the BO that the proposed agency action will not cause jeopardy to species or adversely modify critical habitat, or if the wildlife agency offers RPAs to avoid those consequences, the wildlife agency must give the action agency an incidental take statement (ITS) setting forth the “impact of such incidental taking on the species,” any RPAs the wildlife agency “consid-

ers necessary or appropriate to minimize such impact,” and any “terms and conditions” with which the agency must comply to implement the RPAs.⁸⁴

In *Bennett v. Spear*,⁸⁵ the Supreme Court analyzed the legal significance of the BO generated by wildlife agencies during formal consultation, emphasizing that while the BO “theoretically serves an ‘advisory function,’ in reality it has a powerful coercive effect on the action agency”:

The statutory scheme . . . presupposes that the biological opinion will play a central role in the action agency’s decisionmaking process, and that it will typically be based on an administrative record that is fully adequate for the action agency’s decision insofar as ESA issues are concerned. . . . [A] federal agency that chooses to deviate from the recommendations contained in a biological opinion bears the burden of “articulat[ing] in its administrative record its reasons for disagreeing with the conclusions of a biological opinion.” In the government’s experience, action agencies very rarely choose to engage in conduct that the Service has concluded is likely to jeopardize the continued existence of a listed species.⁸⁶

In reaching its conclusion that a BO had “direct and appreciable legal consequences,”⁸⁷ the Court reiterated that the action agency “must not only articulate its reasons for disagreement (which ordinarily requires species and habitat investigations that are not within the action agency’s expertise), but that it runs a substantial risk if its (inexpert) reasons turn out to be wrong.”⁸⁸ Thus, the action agency is “technically free to disregard the Biological Opinion and proceed with its proposed action,” but it does so “at its peril (and that

78. 16 U.S.C. §1536(c).

79. *Id.* In neither §1536(c), where the ESA requires agencies to complete a “biological assessment,” nor §1532 (Definitions) did Congress specifically define that term beyond specifying in §1536(c) that “[s]uch assessment may be undertaken as part of a Federal agency’s compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. §4332).” *Id.* Cf. 50 C.F.R. §402.02 (“[B]iological assessment refers to the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation [of] potential effects of the action on such species and habitat.”) (emphasis added).

80. See 50 C.F.R. §402.02 (“[J]eopardize the continued existence of [a species] means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.”) (emphasis added).

81. 16 U.S.C. §1536(a)(2); see also 50 C.F.R. §402.14. The FWS of the DOI and the NMFS of the U.S. Department of Commerce share responsibility for administering ESA. See *supra* note 37 and *infra* Part V.C. Essentially, the Secretary of the Interior (through FWS) is responsible for terrestrial species, freshwater species, and some marine species (marine birds and sea otter). 50 C.F.R. §222.101. The Secretary of Commerce (through NMFS in the National Oceanic and Atmospheric Administration (NOAA)) is responsible for most marine species and most anadromous fish. *Id.* FWS and NMFS share jurisdiction over certain species such as Atlantic salmon and sea turtles. See, e.g., *Hawksbill Sea Turtle v. Federal Emergency Management Agency*, 126 F.3d 461, 470, 28 ELR 20101 (3d Cir. 1997) (“When the turtles are swimming . . . Commerce bears regulatory responsibility, and when the turtles return to the beach, the regulatory baton passes to Interior.”). Hereinafter, references to “the Service” or “the wildlife agency” will signify whichever of these two agencies properly has responsibility for ESA compliance in a given regulatory context. The FWS and the NMFS will be distinguished only when necessary for a particular purpose.

82. 16 U.S.C. §1536(b)(3)(A).

83. 50 C.F.R. §402.02. RPAs are alternative actions within the agency’s legal authority “that can be implemented in a manner consistent with the intended purpose of the action.” *Id.* RPAs are designed to avoid the likelihood of jeopardizing the continuing existence of the species or of destroying or adversely modifying critical habitat, and must be economically and technologically feasible for the agency to implement. *Id.*

84. 16 U.S.C. §1536(b)(4). In *Gonzales v. Oregon*, 126 S. Ct. 904, 921 (2006) (rejecting Attorney General’s interpretation of Controlled Substances Act to prevent doctors from prescribing drugs used to assist suicide), the Court analyzed and resolved a dispute regarding relative agency power in decision-making presenting a close analog of the divided authority in the relationships Congress delineated in ESA between the action agencies and the Secretaries of the wildlife agencies—as may readily be seen by simply considering the Attorney General and the Secretary of Health and Human Services (HHS) under the Act at issue in *Gonzales* as the action agencies and the Secretaries of the wildlife agencies under ESA, i.e.:

The authority desired by the Government is inconsistent with the design of the statute in other fundamental respects. The Attorney General [action agencies] does [do] not have the sole delegated authority under the [Act]. He [they] must instead share it with, and in some [all] respects defer to, the Secretary, whose functions are likewise delineated and confined by the statute. The [Act] allocates decision-making powers among statutory actors so that medical [wildlife] judgments . . . are placed in the hands of the Secretary. In the scheduling [consultation] context, for example, the Secretary’s recommendations on scientific and medical [wildlife] matters bind the Attorney General [the action agencies]. The Attorney General [the action agencies] cannot control a substance [fulfill their mandatory ESA section 7 duty to “avoid jeopardy”] if the Secretary disagrees.

Gonzales, 126 S. Ct. at 920.

85. 520 U.S. 154, 27 ELR 20824 (1997) (holding that claim that Secretary failed to consider economic impact of designating critical habitat was reviewable under ESA’s citizen-suit provision; but claim that biological opinion did not comply with ESA’s requirement to use best available scientific and commercial data was reviewable under APA).

86. *Id.* at 169 (quoting Brief of Respondent at 20-21, *Bennett v. Spear*, 520 U.S. 154, 27 ELR 20824 (1977) (No. 95-813)) (citations omitted).

87. *Bennett*, 520 U.S. at 178.

88. *Id.* at 169.

of its employees), for ‘any person’ who knowingly ‘takes’ an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment.”⁸⁹

B. Wildlife Agencies’ Consultation Procedures for Making “Not Likely to Adversely Affect” Determination

1. General “Not Likely to Adversely Affect” Consultation Regulatory Procedures

Before the wildlife agencies adopted counterpart regulations, 50 C.F.R. §402.13-14 governed the obligations of an action agency making a not likely to adversely affect (NLAA) determination. Those sections prescribe the requirements of the general regulations for, respectively, informal and formal consultation (as depicted in Appendix on Charts A and B, and analyzed further below).

Pursuant to 50 C.F.R. §402.13-14, an action agency’s initial determination that a proposed action was a major construction project triggered that agency’s obligation to consult with the expert wildlife agency. From that point, enough consultation must occur to enable the action agency to make either an NLAA or a likely to adversely affect (LAA) determination. If the latter, formal consultation is generally required.⁹⁰

Whether proceeding initially in informal or in formal consultation processes, if in the course of its consultation with the wildlife agency the action agency determined, “with the written concurrence of the Service,” that its proposed action was “not likely to adversely affect” protected species, “the consultation process is terminated, and no further action is necessary.”⁹¹ Therefore, the effect of making an NLAA determination is to foreclose further consideration that any protective measures would be required to avoid jeopardy to protected species. Pursuant to the general regulations, the final agency action for making NLAA ecological determinations that insured the proposed agency action would avoid such jeopardy belongs to the expert wildlife agencies—not to the action agencies.

2. Revised Counterpart NLAA Consultation Regulatory Procedures

As depicted in Appendix, Chart C, the ESA/FIFRA and the ESA/NFP counterpart regulations alter significantly the general regulations’ requirements for both action agencies and wildlife agencies involved in making NLAA determinations. Because these counterpart regulatory revisions are similar for both ESA/FIFRA and ESA/NFP actions, for ease of reference, in this article I will hereafter discuss primarily the ESA/FIFRA counterpart regulations.

The wildlife agencies’ stated rationale for “implement[ing]” the ESA/NFP counterpart regulations was “to proactively reduce . . . anticipated delays and to increase the Service’s capability to focus on Federal actions requiring

formal consultation by eliminating the [regulatory] requirement [for the Services] to provide written concurrence for [NLAA] actions within the scope of these counterpart regulations.”⁹² These revisions thus shift the bulk of—and responsibility for—the ecological analysis needed to determine that a proposed agency action would “not likely affect” protected species from the wildlife agencies to the action agencies. Pursuant to these revisions, the action agencies now take the final agency action in making NLAA ecological determinations.

Before using the revised NLAA counterpart procedures, action agencies must execute an alternative consultation agreement with wildlife agencies:

The alternative consultation process . . . will allow the Service to provide training, oversight, and monitoring to an Action Agency through an alternative consultation agreement (ACA) that enables the Action Agency to make an NLAA determination for a project implementing the NFP without informal consultation or written concurrence from the Service.⁹³

In promulgating both ESA joint counterpart consultation regulations, the wildlife agencies eliminated their written concurrence on action agencies’ NLAA determinations—that is still required for other NLAA determinations by the wildlife agencies’ own general consultation regulations. Instead the wildlife agencies have established ESA counterpart procedures for FIFRA and NFP matters that substitute overall programmatic training, oversight, and monitoring of action agency employees for the wildlife agencies’ fulfilling their own prior role as final arbiter of each individual NLAA decision.

3. Comparative Analysis of General and Revised Counterpart NLAA Consultation Regulatory Procedures

The primary deficiency of the revised NLAA procedures promulgated by both ESA counterpart regulations is their elimination of any consultative role for the expert wildlife agencies. Yet Congress explicitly commanded that the Secretary of the wildlife agencies must engage in “consulta-

92. *Id.* To the contrary, in summarizing substantive comments to the proposed ESA/FIFRA counterpart regulations, Holly Doremus reiterated many commenters’ suggestion that “eliminating the Service concurrence is like asking the fox to watch the henhouse”:

Many commenters believe that the different missions between the Action Agencies and the Service will not allow the Action Agencies to make decisions that would be “equally as protective of listed species and critical habitat.” In fact many commenters noted that historically, the action agencies have pursued environmentally damaging projects that were in direct conflict with their own policy. . . . One State noted that they [sic] believe the elimination of oversight and environmental review will allow the Action Agencies to abuse their discretion.

Holly Doremus, *Science Plays Defense: Natural Resource Management in the Bush Administration*, 32 Ecology L.Q. 249, 284 n.176 (citing Joint Counterpart Regulations, 68 Fed. Reg. at 68259).

93. ESA/NFP Counterpart Regulations, 68 Fed. Reg. at 68254. Similarly, in promulgating the ESA/FIFRA counterpart regulations, the wildlife agencies believed that “[n]ew, streamlined procedures promise to be more efficient for both EPA and the Services, and potentially more protective of listed species, because they will allow EPA and the Services to focus more resources on those actions most likely to pose risk to listed species.” ESA/FIFRA Counterpart Regulations, 69 Fed. Reg. at 47732, 47736.

89. *Id.* (quoting ESA §1540(a), (b) (authorizing civil fines of up to \$25,000 per violation and criminal penalties of up to \$50,000 per violation and imprisonment for up to one year)) (citing Babbitt v. Sweet Home Chapter of Communities for Great Or., 515 U.S. 687, 708, 25 ELR 21194 (1995) (upholding interpretation of term “take” to include significant habitat degradation)).

90. See *supra* Section A. and *infra* Appendix, Chart B.

91. 50 C.F.R. §402.13.

tion” with action agencies to “[e]nsure” that both fulfill their ESA §7(a)(2) mandatory duties to avoid jeopardy to protected species.⁹⁴ Without any such consultation, efficient results in other federal programs may well be achieved, but at the cost of compliance with congressional ESA mandates. Such result could scarcely be squared with Congress’ unambiguously expressed intent, as construed in *TVA*, “reveal[ing] an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species.”⁹⁵

The wildlife agencies’ stated rationales in promulgating both sets of counterpart regulations do not demonstrate a wholehearted adherence to this congressional purpose and policy. But they do demonstrate how the wildlife agencies’ apparent desire for “faster reviews”⁹⁶ have helped drive the ESA train pell-mell past the point at which the Services may be able to ensure that the result of such reviews also complies with ESA §7.

For example, in the preamble to the ESA/NFP counterpart regulations, the wildlife agencies noted that “the concurrence process could cause delays.”⁹⁷ The wildlife agencies’ answer to this problem in the counterpart regulations is to “permit a project to proceed following an Action Agency’s NLAA determination *without an overlapping review by the Service*, where the Service has provided specific training and oversight to achieve comparability between the Action Agency’s NLAA determination and the *likely* outcome of an overlapping review by the Service.”⁹⁸ But it is at best speculative to opine in advance what the likely outcome of an individual review that one does not undertake would show when all that one does do is oversee a program in which another takes all final agency actions on all individual reviews.⁹⁹

A second notable deficiency concerning the revised NLAA procedures promulgated by both ESA counterpart regulations is signaled by the wildlife agencies’ notice, in the Preamble to the ESA/FIFRA counterpart regulations, that the Alternative Consultation Agreement (ACA) establishing precisely how action agency EPA is to undertake on its own the NLAA determinations that are now the final agency actions is itself “not part” of the rule establishing the counterpart regulations.¹⁰⁰ Moreover, the ACA “will not

constitute a rule subject to the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. 553.”¹⁰¹

But what kind of shadow rulemaking is this? Why are the wildlife agencies properly promulgating a “rule” pursuant to the APA, but then sidelining the guts of it in a side agreement lacking the transparency and regularity of established APA procedural requirements?

Even a quick perusal of the terms of the ACA for the ESA/FIFRA counterpart program only heightens such concerns.¹⁰² For example, §X.(A) of the ACA regarding termination specifies as criteria for terminating the agreement a reasonable belief that implementing the ACA will not “satisfy relevant requirements” of either the ESA or FIFRA or their implementing regulations.¹⁰³ Nevertheless, §X.(B) then specifies that—apparently even in such cases where the statutes the agencies are entrusted by Congress to administer may be violated—no termination “shall be effective unless and until 21-day advance written notice has been provided to the Secretary(s) and the Administrator,” and such notice “shall not be submitted until at least 21 days after the issue has been submitted to the Assistant Secretary(s) and Assistant Administrator for resolution.”¹⁰⁴

This is indeed a triumph of bureaucracy—and a far cry from the *TVA* Supreme Court’s quoting Congress’ rationale for espousing a policy of “institutionalized caution” in ESA, i.e., to preserve the “value” of humanity’s “genetic heritage [which] is, quite literally, incalculable.”¹⁰⁵ Unlike a “real” rule properly promulgated pursuant to 5 U.S.C. §553, the ACA contains no beginning “Authority” section. What could be the source of authority that the Secretary(s) and Administrator claim authorizes their negating their duty to check even statutory violations until a contractual 42-day dispute resolution period expires?

Other terms of the ACA demonstrate in other ways the extent of action agency EPA’s encroachment on what would otherwise be encompassed within the wildlife agencies’ §7-mandated consultative function. For example, §V.(E) of the ACA—entitled “Procedures EPA will use to inform the Services of its NLAA determinations”—provided that EPA will only make available to the wildlife agencies notice of “all NLAA determinations it has made with respect to pesticides” at the same time at and in the same manner in which it notifies the public of them, i.e., by posting notices of NLAA actions on its website.¹⁰⁶ Further, in the ACA the wildlife agencies also agree that even if the ACA is terminated, all prior action agency NLAA decisions still stand.¹⁰⁷ What will the wildlife and action agencies do pursuant to this provi-

94. 16 U.S.C. §1536(a)(2).

95. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 185, 8 ELR 20513 (1978).

96. ESA/NFP Counterpart Regulations, 68 Fed. Reg. at 68254.

97. *Id.*

98. *Id.* at 68254, 68257 (emphasis added).

99. In the Preamble to the ESA/FIFRA counterpart regulations, the wildlife agencies emphasized how “the number of annual pesticide decisions made by EPA was also a factor potentially affecting how best to improve the §7 consultation process”:

In a typical year, EPA will make hundreds of significant decisions regarding pesticide registration. . . . Numbers of actions . . . have risen each year since FY 2000. The number of requests by EPA to initiate consultation on pesticide actions is expected to increase substantially in future years. . . . This rule is intended to make the consultation process more efficient because some FIFRA actions could be conducted pursuant to the alternative consultation procedures outlined in this rule.

Id. at 47736.

100. *Id.* at 47737.

101. *Id.* Although the Preamble to the ESA/NFP counterpart regulations similarly provides for execution of an ACA to govern action agency NFP actions, that preamble does not contain such a disclaimer. ESA/NFP Counterpart Regulations, 68 Fed. Reg. at 68254.

102. The ACA was signed on August 25-26, 2004, by the Acting Assistant Administrator, Office of Prevention, Pesticides, and Toxic Substances, EPA; Director, FWS; and Assistant Administrator for Fisheries, NOAA. See U.S. EPA ET AL., ALTERNATIVE CONSULTATION AGREEMENT FOR IMPLEMENTATION OF OPTIONAL ALTERNATIVE CONSULTATION PROCEDURES (2005), available at <http://www.epa.gov/espp/consultation/final-aca.pdf> [hereinafter ACA].

103. *Id.* at 9.

104. *Id.* at 9.

105. 437 U.S. at 177, 194 (emphasis added) (quoting H.R. REP. NO. 93-412, at 4-5 (1973)).

106. ACA, *supra* note 102, at 6.

107. *Id.* at 10.

sion when, as has now occurred, a court rules their promulgation of the counterpart NLAA regulatory revisions invalid and sets the regulations aside as contrary to law.¹⁰⁸

C. Wildlife Agencies' Consultation Procedures for Formal Consultation After Making "May Affect" or LAA Determinations

1. General Formal Consultation Regulatory Procedures

As outlined above in Part III.A., the extensive statutory/regulatory process of formal consultation (depicted in Appendix, Chart B) is triggered by the action agency's making a finding that its proposed project either "may affect" or is "likely to adversely affect" a protected species. In the ESA/FIFRA regulations, the wildlife agencies promulgated optional counterpart revisions for formal consultation analyzed below (and depicted on Chart D). The wildlife agencies made no such changes in the ESA/NFP regulations.

At a minimum, an action agency's may-affect determination triggers its obligation to prepare a biological assessment.¹⁰⁹ If that document shows that the action agency's proposed project is "likely to adversely affect" a protected species, the action agency must undertake the statutorily required process described above in Part III.A.¹¹⁰ This process ultimately ends with the wildlife agency's issuing a BO—the strongly operative force of which the Supreme Court emphasized in *Bennett*¹¹¹—and, as required, also reasonable and prudent alternatives and an incidental take statement. Formal consultation is a highly labor-intensive activity for the wildlife agency whose final agency actions at the end of a complex and lengthy process are the last word in all disputed matters—as, for example, in delineating the extent of mitigating factors that will be required of the action agency.¹¹²

108. See *Washington Toxics Coalition v. U.S. Fish & Wildlife Serv.*, 457 F. Supp. 2d 1158, 36 ELR 20190 (W.D. Wash. 2006).

109. If at any point in this process, the action agency determines—with the written concurrence of the wildlife agency—that its proposed project is "not likely to adversely affect" protected species, then no further consultation is necessary. See *supra* Section A.

110. As supplemented by the extensive regulatory requirements elaborated in over three pages in 50 C.F.R. §402.14—from which, e.g., the *Washington Toxics* court in its decision set forth a block quotation running almost a page. *Washington Toxics*, 457 F. Supp. 2d at 1161 n.1.

111. 520 U.S. at 154. See *supra* notes 85-89 and accompanying text.

112. See *Bennett*, 520 U.S. at 169 ("A Biological Opinion of the sort rendered here alters the legal regime to which the action agency is subject.")

As then-Judge Stephen G. Breyer wrote some 20 years ago, "courts will defer more when the agency has special expertise that it can bring to bear on the legal question." Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986). Over the past 30 years, the Supreme Court has also in its jurisprudence proven the opposite proposition, i.e., that it will defer less—if at all—to agencies that do not have such special expertise to "bring to bear on the legal question" on which they undertake to act. The strength of such case law also stands against any likelihood that Congress in ESA could have intended to delegate to the Secretaries of the expert wildlife agencies the authority to subdelegate dispositive wildlife-protective decisions to the managers of a plethora of action agencies expert in a wide range of disparate matters.

For example, in *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (affirming appellate court's reversal of district court's denial of relief to aliens challenging Civil Service Commission regulations excluding most persons but American citizens from most federal service employment), the Supreme Court specifically stated as a rationale for its holding that the agency performs but "a limited and spe-

2. Revised Counterpart Formal Consultation Regulatory Procedures

As depicted in Appendix, Chart D, the ESA/FIFRA counterpart regulations alter significantly the general regulations' approach to formal consultation. These revisions potentially shift the majority, if not almost all, of the ecological analysis from the wildlife agencies to the action agencies.¹¹³ Unlike the revised NLAA counterpart procedures analyzed above in Part III.B., however, they ultimately do maintain the final agency action as the wildlife agency's.¹¹⁴

In promulgating the revised counterpart procedures for formal consultation, the wildlife agencies explicitly relied on action agency EPA's "expertise in assessing the ecological effects of pesticide products."¹¹⁵ The revised procedures therefore permit action agency EPA to submit its own NLAA effects determinations to the wildlife agency for approval—along with draft conclusions as to whether a proposed FIFRA pesticide registration is "likely to jeopardize" a protected species, and descriptions of the anticipated ef-

cific function" and "has no responsibility" first, "for" or, second, "even" to "be concerned with" a host of other specialized areas that the agency's disputed action apparently reached, e.g., first, foreign affairs, treaty negotiations, establishing immigration quotas or conditions of entry, or naturalization policies, and, second, even "the economic consequences of permitting or prohibiting the participation by aliens in employment opportunities in different parts of the national market." The Supreme Court therefore concluded that, since the "only" concern of the agency was "promotion of an efficient federal service," only "administrative convenience"—not also this wealth of above-cited broader rationales—might provide a "rational basis" for the agency's general rule.

In *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (migrant workers were not barred under Migrant and Seasonal Agricultural Worker Protection Act from bringing private right of action alleging intentional violations of Act by exclusivity provisions of state workers' compensation laws), the Supreme Court emphasized that a "precondition to deference under *Chevron* is a congressional delegation of administrative authority" (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). See also *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment) (rejecting *Chevron* deference where statute "is not administered by any agency but by the courts").

Moreover, in *Gonzales v. Oregon*, 126 S. Ct. 904 (2006), the Supreme Court emphasized that "the structure" of the statute "convey[ed] unwillingness to cede medical judgments to an Executive official who lacks medical expertise." Revalidating its past practice in interpreting statutes that "divided authority," the Supreme Court in *Gonzales* reiterated its prior holding in *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 153 (1991) (holding that a court should defer to the Secretary of Labor where the Secretary and the Civil Service Commission both offer reasonable but conflicting interpretations of ambiguous regulation that the Secretary promulgated):

Because historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court, we presume here that Congress intended to invest interpretive power in the administrative actor in the best position to develop these attributes.

113. See, e.g., ESA/FIFRA Counterpart Regulations, 69 Fed. Reg. at 47737-39.

114. See *id.* at 47738.

Any such final opinion or statement will be signed by the Service Director, who may not delegate this authority beyond certain designated headquarters officials, and will constitute the opinion of the Secretary and the incidental take statement, reasonable and prudent measures, and terms and conditions under [ESA] §7(b)

Id.

115. *Id.* at 47737-38.

fects of any incidental takings, as well as of any reasonable and prudent measures EPA could adopt to mitigate the effects of its proposed actions on protected species.¹¹⁶

Pursuant to the revised counterpart procedures for formal consultation, the wildlife agencies also for the first time granted EPA the authority to use its own partial BO in making a finding under ESA §7(d) as to whether the proposed FIFRA action “constitutes an irreversible and irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives. . . .”¹¹⁷ Under the general consultation regulations, only the expert wildlife agencies prepare a BO.¹¹⁸

3. Comparative Analysis of General and Revised Counterpart Formal Consultation Regulatory Procedures

Because the ESA/FIFRA regulatory revisions to the existing formal consultation are optional, environmental plaintiffs mounting a facial challenge to them would likely not succeed. In such procedural posture, i.e., before the revised regulatory “option” were exercised, plaintiffs would appear to be asking the court for an advisory opinion: thus running afoul of the constitutional justiciability “cases and controversies” mandate.¹¹⁹

But if plaintiffs sued wildlife agencies alleging illegal effects of the action agency’s pesticide registrations on protected species after EPA had actually used the counterpart formal consultation procedures purportedly to fulfill its ESA §7(a)(2) mandatory duty to avoid jeopardy, a district court would likely require that challenge to be litigated on the administrative record of the particular agency action in which the revised procedures were used.

First, applying *Chevron*, a district court would likely rule that it was permissible for the wildlife agencies to have allowed EPA a more active role in completing the ecological analysis underpinning the ultimate recommendations contained in the BO because the final agency action to accept or reject these action agency recommendations remains with the wildlife agency. Thus, contrary to the revised counterpart regulatory framework for NLAA actions (analyzed in Part III.B. above), the wildlife agencies did not attempt in the revised counterpart formal consultation procedures wholly to absent themselves from the consultative process in making final ecological determinations on the effects of individual proposed agency actions.

A district court would likely decide pending challenges to any such action agency use of the revised counterpart optional procedures for formal consultation at the *Chevron* Step Two level. That is, as occurs now in actions challenging the Service’s issuance of BOs under the general formal consultation regulations, the court would invalidate the wildlife

agency’s use of these procedures if the agency’s action in a particular instance were arbitrary and capricious.¹²⁰

On this score, the counterpart formal consultation procedures do provide an additional possible challenge available for environmental plaintiffs bringing a future suit disputing wildlife agencies’ use of them. For, in establishing these revised procedures, the wildlife agencies explicitly relied on EPA’s “expertise in assessing the ecological effects of pesticide products.”¹²¹ Yet it is likely a dubious assumption that such particularized action agency expertise regarding pesticide effects is necessarily equal to the wildlife agencies’ own expertise in assessing potentially overall destructive effects of action agencies’ proposed actions on endangered and threatened species.

Future plaintiffs may thus be able to establish a disconnect between how the wildlife agencies’ and action agency EPA’s ecological expertise was different in kind and so on specific final agency actions did in fact lead to decisions less likely to avoid jeopardy to protected species. If so, a district court reviewing particular challenged actions would likely invalidate any in which the wildlife agencies had allowed use of the revised counterpart formal consultation procedures in a decision that produced results less compliant with the ESA than use of the existing formal consultation procedures would have.

D. Wildlife Agencies’ Emergency Regulatory Procedures

1. General Emergency Consultation Regulatory Procedures

In the ESA/FIFRA regulations, the wildlife agencies promulgated optional revisions for consultation during emergencies.¹²² The wildlife agencies made no such changes in the ESA/NFP regulations.

Pursuant to 50 C.F.R. §402.05, emergencies are defined as “acts of God, disasters, casualties, national defense or security emergencies, etc.”¹²³ Where such circumstances “mandate the need to consult in an expedited manner,” a Service director may conduct informal consultation that s/he determines “consistent with the requirements” of ESA §7(a)-(d).¹²⁴ Nevertheless, formal consultation “shall be initiated as soon as practicable after the emergency is brought under control.”¹²⁵ Moreover, even in time of such emergency, the general regulations maintain the careful “non-emergency” delineation of the very disparate roles that Congress prescribed for the action agency and the expert wildlife agency, i.e.,

[t]he Federal Agency shall submit information on the nature of the emergency action(s), the justification for the expedited consultation, and the impacts to endangered and threatened species and their habitats. The Service will evaluate such information and issue a biological opinion and recommendations given during the emergency consultation.¹²⁶

116. *Id.* at 47738.

117. *Id.* at 47739.

118. See also *supra* notes 110-12 and accompanying text. See *infra* Appendix, Charts B and D.

119. U.S. CONST. art. §2, cl. 1. See also, e.g., *United States v. Salerno*, 481 U.S. 739, 745 (1987) (“A facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully . . .”); *Reno v. Flores*, 507 U.S. 292, 301 (1993) (applying *Salerno* to challenges of regulations) (“[T]o prevail in such a facial challenge, [the challenger] must establish that no set of circumstances exists under which the regulation would be valid.”).

120. See 5 U.S.C. §706.

121. 69 Fed. Reg. at 47737-38.

122. 50 C.F.R. §402.05(a).

123. *Id.*

124. *Id.*

125. *Id.* §402.05(b).

126. *Id.*

2. Revised Counterpart Emergency Consultation Regulatory Procedures

The ESA/FIFRA counterpart regulations alter significantly the general regulations' approach to emergencies through one principal change. They permit EPA to "choose" to apply the ESA emergency consultation procedures also to FIFRA §18 actions.¹²⁷

FIFRA emergency conditions are defined in FIFRA's implementing regulations for §18 as including a much broader range of activities potentially qualifying as emergency conditions than the scope of the ESA's regulatory definition of emergencies. For FIFRA pesticide registration purposes, emergency conditions means "an urgent, non-routine situation that requires the use of a pesticide(s) and shall be deemed to exist when" a combination of several itemized factors is present.¹²⁸ These factors could include either that the pesticide use will "present significant risks to threatened or endangered species, beneficial organisms, or the environment"¹²⁹—or that the pesticide use will "cause significant economic loss due to: (A) An outbreak or an expected outbreak of a pest. . . ."¹³⁰

3. Comparative Analysis of General and Revised Counterpart Emergency Consultation Regulatory Procedures

The "etc." that concludes the ESA definition of emergency would likely be construed as imparting some flexibility to the otherwise specified terms "acts of God, disasters, casualties, national defense or security emergencies, etc."¹³¹ Yet clearly the potential exists for a significant disconnect between the more narrow definition of ESA's emergency and the broader one of FIFRA's emergency conditions.

Nevertheless, as similarly discussed above regarding the revised counterpart procedures for formal consultation, because the ESA/FIFRA regulatory revisions to emergency consultation are optional, environmental plaintiffs mounting a facial challenge to them would likely not succeed.¹³² In such procedural posture, i.e., before the revised regulatory option were exercised, plaintiffs would also appear to be asking the court for an advisory opinion: thus running afoul of the constitutional justiciability "cases and controversies" mandate.¹³³

But if plaintiffs sued wildlife agencies alleging illegal effects of the action agency's pesticide registrations on pro-

tected species after EPA had actually used the counterpart emergency consultation procedures purportedly to fulfill its ESA §7(a)(2) mandatory duty to avoid jeopardy, a district court would also likely require that challenge to be litigated on the administrative record of the particular agency action in which the revised procedures were used. A district court would also then likely decide pending challenges to any such action agency use of the revised counterpart "optional" procedures at the *Chevron* Step Two level.

In promulgating the revised optional emergency procedures, the wildlife agencies "believe[d] that EPA's statutory and regulatory standard for an 'emergency' under FIFRA section 18 is generally comparable to the intended scope of emergency in [ESA regulations 40 C.F.R.] §402.05 and that, therefore, the overwhelming majority of FIFRA emergency exemptions could properly be considered emergencies for the purposes of §402.05."¹³⁴ To the extent that this presumed "comparability" does not prove accurate regarding the facts at issue on a particular administrative record, the wildlife agencies may expect a district court to set aside their actions as arbitrary and capricious. For, if the wildlife agencies improperly equated two different statutorily defined emergencies to allow FIFRA actions that would not have qualified for the ESA emergency exemption to defer formal consultation as if they had, a district judge is likely to rule the wildlife agencies not in compliance with both ESA and their own ESA-implementing regulations.

For example, a FIFRA pesticide registration proceeding under ESA's emergency regulatory provisions might ultimately survive a challenge to the action agency's authority in emergency conditions to defer formal consultation on proposed pesticides registration if the counterpart provisions were applied because the situation presented "significant risks to threatened or endangered species, beneficial organisms, or the environment."¹³⁵ But a decision to use the new counterpart authority to defer formal consultation for FIFRA emergency conditions under ESA's emergency regulation is likely to be held invalid, i.e., beyond the scope of the action agency's authority, if EPA had in fact registered the challenged pesticide to prevent "significant economic loss due to . . . an outbreak or an expected outbreak of a pest. . . ."¹³⁶

IV. Judicial Review of Challenges to Joint Counterpart ESA §7 Consultation Regulations

The *Washington Toxics* court recently issued a decision—now on appeal to the Ninth Circuit¹³⁷—in the first judicial challenge to the ESA/FIFRA counterpart regulations. Construing the challenged regulatory provisions vis-à-vis relevant portions of ESA §7, the court held invalid the revised NLAA and emergency consultation provisions as "arbitrary and capricious, and contrary to law."¹³⁸ Accordingly, the court ordered these provisions of the ESA/FIFRA counterpart regulations set aside and enjoined the wildlife agen-

127. See, e.g., ESA/FIFRA Counterpart Regulations, 69 Fed. Reg. at 47739-40.

128. 40 C.F.R. §166.3(d) (2006). Moreover, for such FIFRA-defined "emergencies," Congress granted the EPA Administrator discretion to "exempt any Federal or State agency from any provision" of FIFRA if the Administrator "determines that emergency conditions exist which require such exemption." 7 U.S.C. §136p.

129. 40 C.F.R. §166.3(d)(3)(iii) (2006).

130. *Id.* §166.3(d)(3)(iv).

131. *Id.* §402.05(a).

132. See also, e.g., *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully . . ."); *Reno v. Flores*, 507 U.S. 292, 301 (1993) (applying *Salerno* to challenges of regulations) ("[T]o prevail in such a facial challenge, [the challenger] must establish that no set of circumstances exists under which the regulation would be valid.").

133. U.S. CONST. art. III, §2, cl. 1.

134. ESA/FIFRA Counterpart Regulations, 69 Fed. Reg. at 47739.

135. 40 C.F.R. §166.3(d)(3)(iii).

136. *Id.* §166.3(d)(3)(iv).

137. 457 F. Supp. 2d at 1158, *appeal docketed*, No. 06-3573 (9th Cir. Oct. 17, 2006); see also *supra* Part I.B. and accompanying notes.

138. 5 U.S.C. §706(2). See *infra* Part IV.B. for further discussion of the *Washington Toxics* court's NLAA and emergency provisions rulings.

cies from implementing them. However, the court upheld the revised formal consultation regulations.¹³⁹

The *Kempthorne* court subsequently held valid the NLAA revisions made by the ESA/NFP counterpart regulations—even though those regulations raised the same ESA §7 statutory construction issues as the *Washington Toxics* court had previously decided differently when holding analogous NLAA revisions made by the ESA/FIFRA counterpart regulations invalid.¹⁴⁰

A. Context of Rulings by Washington Toxics Court Regarding Invalidity of ESA/FIFRA—and Kempthorne Court Regarding Validity of ESA/NFP—Counterpart Consultation Regulations

Both the *Washington Toxics* and the *Kempthorne* courts denied the wildlife agencies' jurisdictional challenges, concluding that plaintiffs had standing to bring claims arguing the counterpart regulations were invalid.¹⁴¹

The *Washington Toxics* court also determined that plaintiffs' challenges to the ESA/FIFRA regulations were ripe. First, the claim was a purely legal one: promulgating "the regulation here is the action being challenged."¹⁴² Second, because under the revised procedures there would be no further administrative analysis by a wildlife agency of challenged action agency decisions, judicial review of the counterpart regulations by definition could not "inappropriately interfere with further administrative analysis."¹⁴³ Rather, because the "practical effect" is to "remove the Services from part of the FIFRA loop [e.g., when EPA approves pesticide registrations]," the challenged counterpart regulations "make it difficult for the Services to remain apprised of and involve themselves in policing EPA FIFRA determinations."¹⁴⁴

In analyses that tracked those of the courts' opposing rulings regarding statutory construction and regulatory validity, the *Washington Toxics* and the *Kempthorne* courts also ruled in a contradictory manner on analogous National Environmental Policy Act (NEPA)¹⁴⁵ challenges to the counterpart regulations.

The *Washington Toxics* court held that the environmental assessment (EA) and finding of no significant impact (FONSI) issued by the wildlife agencies before promulgating the ESA/FIFRA regulations were inadequate. Rather, the court concluded that the Services violated NEPA by not preparing a more comprehensive environmental impact statement (EIS) fully "considering all of the impacts of, and alternatives to, adoption of the NLAA and emergency consultation provisions of the counterpart regulations."¹⁴⁶

The *Kempthorne* court, however, ruled that the EA prepared by the wildlife agencies before promulgating the ESA/NFP counterpart regulations was sufficient to comply with NEPA. The court could not conclude that the Services had "failed to take a 'hard look'" at the "relevant areas of environmental concern" they had identified.¹⁴⁷

The two district courts also differed in the standards they used to review the challenged revisions to the ESA counterpart consultation regulations. The *Washington Toxics* court began its initial review of the ESA/FIFRA counterpart revisions without determining the ultimate applicability of either *Chevron's* two-part standard applied in judicial review of agency action involving statutory construction¹⁴⁸ or the tougher "no set of circumstances" *Salerno/Reno* standard used for facial challenges to regulatory acts.¹⁴⁹ Rather, the court opined, those standards would merge if plaintiffs' challenges had merit. That is, the arguably stricter *Salerno* standard would also then be met: there would be "no set of circumstances under which the counterpart regulations could be valid because their very terms violate the relevant statute."¹⁵⁰

The *Washington Toxics* court ultimately determined that the NLAA portion of the challenged ESA/FIFRA counterpart regulations failed the *Chevron* Step One test. Accordingly, the court set aside the NLAA counterpart revisions to the general consultation regulations and enjoined the wildlife agencies from implementing them.¹⁵¹

The *Kempthorne* court's differing statutory interpretation of ESA §7 led that court ineluctably to employ a *Chevron* Step Two analysis. That initial choice of different analytical path led the *Kempthorne* court to uphold the challenged NLAA provisions of the ESA/NFP counterpart regulations.¹⁵²

taking major federal actions likely to have a significant effect on the environment).

139. *Washington Toxics*, 457 F. Supp. 2d at 1200-01.

140. *Kempthorne*, 2006 WL 2844232, at *19 n.15 (distinguishing *Washington Toxics* court's prior ruling in a footnote). Before addressing plaintiffs' challenge to the ESA/NFP counterpart regulations, the *Kempthorne* court spent most of its opinion determining that the case must again be remanded to the FWS to require again that the FWS specifically address its finding that the court had ordered the FWS to explain three years before, i.e., that several regions of the country did not collectively constitute a significant portion of the threatened Canada lynx's range.

141. *Washington Toxics*, 457 F. Supp. 2d at 1168 (analyzing organizational standing issues); *Kempthorne*, 2006 WL 2844232, at *14-15 (analyzing procedural injury standing issues). Both courts' rulings were on cross-motions for summary judgment.

142. *Washington Toxics*, 457 F. Supp. 2d at 1172.

143. *Id.* at 1174 (citing *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733-34, 28 ELR 21119 (1998) (finding that premature judicial review of an NFP would deny agency opportunity to correct mistakes and apply expertise doing so when further consideration would occur before plan was implemented)).

144. *Id.* at 1173-74 (distinguishing *Ohio Forestry Ass'n*, 523 U.S. at 733-34; reiterating that "specific effect of the counterpart regulations, removing a potential dissenting voice from EPA effects determinations, makes it less likely rather than more likely that future developments will inspire the Services to reconsider and 'correct' the counterpart regulations, if necessary" (emphasis added)).

145. 42 U.S.C. §§4321-4347 (establishing the legal requirement that federal agencies must conduct environmental assessment before under-

146. *Washington Toxics*, 457 F. Supp. 2d at 1200.

147. *Defenders of Wildlife v. Kempthorne*, No. 04-1230(GK), 2006 WL 2844232, at *21. (D.D.C. Sept. 29, 2006).

148. See case cited *supra* note 1.

149. *Washington Toxics*, 457 F. Supp. 2d at 1175 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully. . . .") (citing *Reno v. Flores*, 507 U.S. 292, 301 (1993) (applying *Salerno* to challenges of regulations: "[T]o prevail in such a facial challenge, [the challenger] must establish that no set of circumstances exists under which the regulation would be valid.")).

150. *Id.* at 1176.

151. *Id.* at 1180 (citing 5 U.S.C. §706).

152. At Step One, "[t]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, 14 ELR 20507 (1984). See *supra* note 1 and accompanying text. But, if the intent of Congress is not "clear," upon reaching Step Two, "[t]he court need not [even] conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached in the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at

B. Bases for Washington Toxics Court's Rulings Holding Invalid NLAA and Emergency Counterpart Consultation Regulatory Revisions (But Validating Formal Consultation Revisions)

In complex challenges to the new ESA/FIFRA counterpart consultation regulations, the *Washington Toxics* plaintiffs brought two main claims against the FWS:

(1) that the counterpart regulations did not substantively comply with ESA §7(a)(2)—in particular, that the revised alternative procedures for NLAA determinations, formal consultation on “Likely to Adversely Affect” actions (LAA), and FIFRA §18 emergency registrations did not; and

(2) that the wildlife agencies did not comply with ESA §7(a)(2) in promulgating the counterpart regulations, i.e., that they did not because the Services could not promulgate these regulations while still “insuring” that they had themselves fulfilled their *own* mandatory section 7(a)(2) duty to avoid jeopardy to protected species.¹⁵³

In ultimately setting aside both the NLAA and the emergency provisions of the ESA/FIFRA regulations, the *Washington Toxics* court relied upon its review of both the law and the administrative record offered by the FWS in support of the wildlife agencies’ decision to promulgate the ESA/FIFRA counterpart regulations.¹⁵⁴

For example, as to the revised counterpart procedures for making NLAA determinations that the court concluded failed the *Chevron* Step One analysis,¹⁵⁵ the court ruled that the wildlife agencies acted arbitrarily and capriciously “in deciding to promulgate the counterpart regulations in their current state, knowing of the substantial flaws in EPA’s methodologies and knowing that these flaws were highly likely (if not certain) to result in an overall under-protection of listed species as compared to the general consultation regulations.”¹⁵⁶ The court found particularly objectionable that the wildlife agencies “approv[ed] an [action agency EPA] effects determination process known to be deficient and unreliable in many ways,” and “agree[d] that determinations made pursuant to that process may not be disturbed [i.e., pursuant to the terms of the ACA¹⁵⁷].”¹⁵⁸

842 n.11; cf. *Kempthorne*, 2006 WL 2844232, at *19 n.17 (“The Court shares many of Plaintiffs’ concerns about the wisdom and efficiency of the Counterpart Regulations. . . . Because Congress has ‘entrusted the Secretary with broad discretion’ to administer the statute, the Court must be ‘especially reluctant to substitute [its] views of wise policy for his.’”). Nevertheless, the *Kempthorne* court’s granting such judicial deference—appropriate only if the *Chevron* Step Two level of analysis were properly reached—would be misapplied if, as the *Washington Toxics* court ruled, the challenges to the NLAA counterpart regulatory revisions must be decided at Step One.

153. The court found “overwhelming” record evidence establishing that the Services, in promulgating the revised counterpart NLAA procedures, did *not* comply with their own ESA §7 mandate to “ensure” that their actions were “not likely to jeopardize” protected species. *Washington Toxics*, 457 F. Supp. 2d at 1193 (emphasis added).

154. *Id.* at 1177. The court analyzed the first as a legal issue arising as a facial regulatory challenge and the second after meticulously examining the voluminous administrative record. *Id.*

155. *Id.* at 1180. See *supra* notes 148-51.

156. *Id.* at 1193.

157. See *supra* notes 101-07 and accompanying text.

158. *Id.*

As to the revised emergency consultation provisions, the *Washington Toxics* court ruled that the wildlife agencies acted arbitrarily and capriciously in concluding (when promulgating the counterpart regulations) that the “overwhelming majority” of FIFRA emergency exemption actions could also “properly” be considered emergencies pursuant to the emergency section of the general ESA counterpart consultation regulations.¹⁵⁹ To the contrary, the *Washington Toxics* court first determined it was “clear” that “the plain language of the applicable FIFRA regulations goes beyond the plain language of the general consultation regulations.”¹⁶⁰ Consequently, the court found that since EPA itself had “acknowledged that out of about 500 FIFRA §18 [emergency] actions each year, about 400 were repeat specific exemptions for pesticides on the same use site” (thus scarcely emergencies), the Services should not have permitted EPA to apply ESA emergency consultation procedures to “the whole range” of FIFRA §18 actions.¹⁶¹ Accordingly, the court set aside the emergency counterpart revisions to the general consultation regulations and enjoined federal defendants from implementing them.¹⁶²

However, the *Washington Toxics* court did not find the optional consultation revisions of the ESA/FIFRA counterpart regulations “inconsistent” with ESA because the wildlife agencies “remain free to amend or altogether reject EPA’s effects determination in favor of a Service-authored biological opinion, thereby preserving and retaining their consultative role.”¹⁶³ The court therefore upheld these regulatory revisions.

Because the ESA/FIFRA formal consultation provisions were upheld and the emergency provisions were held invalid based upon review of the administrative record of promulgating the regulations, in this Article I subsequently focus on the delegation/statutory construction arguments for and against the validity of the NLAA counterpart regulatory revisions. Specifically, I give a comparative analysis of the relative merit of the *Washington Toxics* court’s legal rationales in holding invalid the revised NLAA portions of the ESA/FIFRA counterpart regulations with those used by the *Kempthorne* court in holding valid the analogous revised NLAA portions of the ESA/NFP counterpart regulations in Section D. below.

C. Bases for Kempthorne Court's Ruling Holding Valid NLAA Regulatory Revisions

The *Kempthorne* court ultimately concluded that the challenged NLAA revisions made by the ESA/NFP counterpart regulations were valid because they were “not an impermis-

159. *Id.* at 1196 (citing ESA/FIFRA Counterpart Regulations, 69 Fed. Reg. at 47739-40).

160. *Id.*

161. *Id.* These “about 400” repeat specific exemptions, e.g., would scarce qualify for the ESA’s emergency consultation provision exemption that applies only to “situations involving acts of God, disaster, casualties, national defense or security emergencies, etc.” 50 C.F.R. §402.05.

162. *Washington Toxics*, 457 F. Supp. 2d at 1180 (citing 5 U.S.C. §706).

163. *Id.* at 1180 (noting that this revised formal consultation procedure may in fact, as plaintiffs claimed, “lower[] the barriers to a Service’s adoption of EPA conclusions and erect[] hurdles in the case of disagreement.”). The court nonetheless concluded that “nothing” in ESA §7(a)(2) “prohibits the shifting of burdens in this way.” *Id.* But see *infra* Part V.B.1.

sible or unreasonable construction of the ESA” and the FWS “considered the relevant data and articulated a satisfactory explanation for them.”¹⁶⁴

The court initially acknowledged that if plaintiffs’ interpretation of ESA §7 were correct, these revised NLAA alternatives to the default consultation regulations “would be invalid” because they do “not mandate consultation on each and every federal project.”¹⁶⁵ But, proceeding “to the familiar two-step inquiry of *Chevron*,” the court immediately opined “there can be no question that this is not a step-one case.”¹⁶⁶ The *Kemphorne* court instead accepted the wildlife agencies’ argument that ESA §7 does not “define the term ‘consultation’ nor . . . provide any direction or criteria as to how [consultation] is to be carried out. Rather, that gap-filling function is left to the informed discretion of the Services.”¹⁶⁷

The court apparently took the fact that Congress had not defined the word consultation in ESA as evidence that Congress had not “spoken to the precise question at issue,” i.e., whether the wildlife agencies might revise their existing NLAA regulations to allow EPA not to consult with them on NLAA effects determinations for protected species.¹⁶⁸ Therefore the court did not conclude, as plaintiffs had argued, that the ESA/NFP counterpart regulations allowed action agencies to “bypass” the Services to achieve ESA compliance on NFP projects.¹⁶⁹ Rather, in deciding that the wildlife agencies still retained sufficient “consultative” role, the court reiterated the “involvement of the Services in the creation of an ACA and the oversight they retain over Action Agencies working pursuant to one, as well as their power to suspend or terminate a poorly-administered ACA.”¹⁷⁰

The *Kemphorne* court distinguished the *Washington Toxics* court’s prior ruling in a footnote:

First, the plaintiffs in *Washington Toxics Coalition* challenged a completely different set of counterpart regulations, based on a very different administrative record, than the Regulations and record under review here. Sec-

ond, and more importantly, the Court was compelled to reach its conclusion in *Washington Toxics Coalition* by Ninth Circuit precedent that is substantively different from the case law interpreting *Chevron* in this jurisdiction. . . . The prevailing law in the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit overwhelmingly supports the proposition that the Secretary’s construction of ambiguous statutory language must stand so long as it is reasonable and permissible.¹⁷¹

D. Comparative Analysis of District Courts’ Opposing Rulings Regarding ESA §7 Statutory Construction and Concomitant Validity of NLAA Counterpart Regulatory Revisions

1. Washington Toxics Court’s Better-Reasoned Statutory Analysis Holding Invalid NLAA ESA/FIFRA Counterpart Regulatory Revisions

As noted above, the *Washington Toxics* court’s analysis as to whether the wildlife agencies could promulgate regulations removing themselves from consultation on NLAA actions in FIFRA matters—and could therefore leave such determinations solely to the discretion of action agency EPA—began and ended on the *Chevron* Step One level.¹⁷² In undertaking this analysis, the court found it “pertinent” to emphasize the continuing power of the Supreme Court’s foundational ESA case. Although *TVA*, for example, “addressed an ESA that required agencies to insure ‘no jeopardy,’ and we are now operating under an ESA requiring only that agencies insure that an action is ‘not likely to jeopardize,’ *TVA* v. *Hill*’s strong rhetoric still lives.”¹⁷³

171. *Kemphorne*, 2006 WL 2844232, at *19 n.15. But see *infra* Part V.A. Again, were the *Kemphorne* court’s decision to “reach” Step Two of the *Chevron* analysis in error, the distinctions: (1) that the *Washington Toxics* court reviewed a very different administrative record; and (2) that the D.C. Circuit may have substantively different case law interpreting the *Chevron* Step Two analysis would be irrelevant. See *supra* note 164. The problematic nature of the *Kemphorne* court’s conclusions on these points is analyzed further *infra* Part IV.D.2.

172. See *supra* notes 148-51 and accompanying text. In analyzing the language of the statute to reach these conclusions, the *Washington Toxics* court relied upon familiar maxims of statutory construction:

(1) that “the ordinary meaning of the words chosen by Congress” is presumed “accurately [to] express its legislative intent,” *Washington Toxics*, 457 F. Supp. 2d at 1176 (citing *Brower v. Evans*, 257 F.3d 1058, 1065, 31 ELR 20829 (9th Cir. 2001));

(2) that the meaning of statutory language, “plain or not, depends on [its] context,” *id.* (citing *Brower*, 257 F.3d at 1065);

(3) that the context of statutory language includes “the design of a statute as a whole and . . . its object and policy,” *id.* (citing *Brower*, 257 F.3d at 1065); and

(4) that, when determining the means of a statutory provision, the court “may consider the purpose of the statute in its entirety, and whether the proposed interpretation would frustrate or advance that purpose,” *id.* (citing *United States v. Mohrbacher*, 182 F.3d 1041, 1049 (9th Cir. 1999)).

In the main, I concur with the *Washington Toxics* court’s rationales. But see *infra* notes 177, 184 and accompanying text. I unequivocally concur with the court’s actions as a matter of law in invalidating and enjoining implementation of the revised NLAA and emergency counterpart consultation procedures.

173. *Washington Toxics*, 457 F. Supp. at 1177 (citing *Sierra Club v. Marsh*, 816 F.2d 1376, 17 ELR 20717 (9th Cir. 1987)). *TVA*’s “strong rhetoric still lives” for two reasons: First, as a practical matter, the distinction between “no jeopardy” and “likely to jeopardize” rarely triggers different initial regulatory consequences. That is, if a proposed action “may” affect or is “likely to adversely affect” a pro-

164. 2006 WL 2844232, at *16. (D.D.C. Sept. 29, 2006). But see *Chevron* analysis *infra* Part IV.A. and B. For if (as I contend and the *Washington Toxics* court ruled) the *Kemphorne* court’s deference to the wildlife agencies’ interpretation of the ESA as permitting them to promulgate the NLAA counterpart procedures were wrongly granted, then the court’s seeming reliance upon evidence in the administrative record as a basis for holding the challenged regulations valid would have been misplaced. The court should not then have reached record issues, since Step One analyses are decided purely as a matter of law. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 837, 843 n.9, 14 ELR 20507 (1984) (“The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”); cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province of the judiciary to say what the law is.”).

165. *Kemphorne*, 2006 WL 2844232, at *19.

166. *Id.* at *17.

167. *Id.* (citing Defendants’ Cross-Motion for Summary Judgment and Opposition, *Defenders of Wildlife v. Kemphorne*, 2006 WL 2844232 (D.D.C. Sept. 29, 2006) (No. 04-1230 (GK))).

168. *Id.* at *18 (citing *Chevron*, 467 U.S. at 843).

169. *Id.* (Kessler, J.).

170. *Id.* But cf. *National Park & Conservation Ass’n v. Stanton*, 54 F. Supp. 2d 7, 20 (D.D.C. 1999) (Kessler, J.) (“The only power NPS [the National Park Service] retains is the extreme remedy of totally terminating the Cooperative Agreement if the Council is not managing the Niobrara [National Scenic River] consistent with the GMP [General Management Plan]. Use of such a draconian weapon is highly unlikely . . .”).

The *Washington Toxics* court first determined that the necessary consequences of the wildlife agencies' argument regarding their statutory interpretation of ESA's gap, i.e., that the NLAA standard "'is not even found in the ESA,'" did not ultimately support their statutory interpretation of "consultation"¹⁷⁴:

While the Services make this point in an effort to show that section 7(a)(2) does not require consultation with and the assistance of the Services to reach an NLAA determination (because NLAA language is not to be found anywhere in the statute), what the point actually shows is that a finding of NLAA is not statutorily equal to a finding that an action is "not likely to jeopardize."¹⁷⁵

The court therefore concluded that "an NLAA determination, standing alone, is not equivalent to a section 7(a)(2) statutorily required determination made by an action agency 'in consultation with and with the assistance of the Secretary' that an action is 'not likely to jeopardize [protected species].'"¹⁷⁶ Further, what credence the court initially appeared to give the wildlife agencies' similar statutory construction arguments on the one hand, it took away with the other—deeming

(1) that wildlife agencies were "correct insofar as they argue that the statute permits the Services to delegate their authority to participate in NLAA determinations"¹⁷⁷; but

(2) that did not necessarily mean the wildlife agencies "may abdicate their consultative role in formulating the conclusion that an [action agency's proposed] action is 'not likely to jeopardize'" protected species.¹⁷⁸

The court next analyzed both the mandatory nature and the meaning of consultation. As to the former, the wildlife agencies had contended that ESA §7's use of "shall" applied "only to the substantive obligation to ensure that an action is not likely to jeopardize listed species."¹⁷⁹ Rejecting this argument "flatly,"¹⁸⁰ the *Washington Toxics* court reiterated that §7(a)(2) "'makes no legal distinction between the trigger for its requirement that agencies consult with FWS and the trigger for its requirement that agencies shape their actions so as not to jeopardize endangered species. . . .'"

tested species, the action agency's formal consultation with the wildlife agency is generally required at the outset. 50 C.F.R. §402.14. See *infra* Part IV.D.2. Second, in opining its strongly protective holdings regarding endangered and threatened species—grounded in its conception of the constitutional limits of the Court's power—the TVA Court had extensively analyzed Congress' intent in the ESA. See, e.g., *TVA*, 437 U.S. at 187-88 ("Quite obviously, it would be difficult for a court to balance the loss of a sum certain—even \$100 million—against a congressionally declared 'incalculable' value, even assuming we had the power to engage in such a weighing process, which we emphatically do not.").

174. *Washington Toxics*, 457 F. Supp. 2d at 1177 (citing U.S. brief).

175. *Id.*

176. *Id.*

177. *Id.* But see *infra* Part V. (contending that pursuant to *Chevron*, the ESA cannot be read to demonstrate Congress' unambiguously expressed intent to permit such intraagency delegation).

178. *Washington Toxics*, 457 F. Supp. 2d at 1177.

179. *Id.*

180. As the Ninth Circuit had done in *Defenders*, the case presently under review by the Supreme Court. *Id.* (citing *Defenders of Wildlife v. EPA*, 420 F.3d 946, 961, 35 ELR 20172 (9th Cir. 2005)).

181. *Id.* at 1177-78 (emphasis added).

An agency's obligation to consult is thus *in aid of* its obligation to shape its own actions so as not to jeopardize listed species, not independent of it. *Both* the consultation obligation and the obligations to "insure" against jeopardizing listed species are triggered by "any action authorized, funded, or carried out by such agency," and *both* apply if such an "action" is under consideration.¹⁸¹

In "the same vein, but broader," the *Washington Toxics* court noted several Ninth Circuit authorities holding "generally that the ESA's procedural requirements are as important, and are mandatory to the same degree as its substantive requirements."¹⁸² The court therefore concluded that ESA §7(a)(2) "requires that EPA, in contemplating even actions deemed NLAA, 'consult' with the Services to ensure that its action be not likely to jeopardize listed species."¹⁸³

As to the meaning of consultation, the court opined that the wildlife agencies were "technically correct" in asserting that NLAA determinations "may be made unilaterally" because "the ESA does not govern how NLAA determinations are to be made."¹⁸⁴ Nevertheless, the court found that ESA "does . . . govern how an NLAA determination is to be converted into a proper ESA-compliant determination of 'not likely to jeopardize,'" i.e., a "unilaterally-made NLAA determination cannot be converted into a section 7(a)(2) finding of 'not likely to jeopardize' without 'consultation' with the relevant Service."¹⁸⁵

In so ruling, the *Washington Toxics* court relied on:

- (1) the ordinary dictionary meaning of "consultation";
- (2) three contextual "internal [statutory] indicators" of what Congress meant by "consultation"; and
- (3) the ESA mandate that "all federal agencies 'shall insure' that their actions be not likely to jeopardize listed species."¹⁸⁶

After examining these factors, the court concluded that—contrary to the wildlife agencies' argument that ESA does not "'provide any direction or criteria' regarding how the consultation is to be carried out"—ESA *does* contain three "highly relevant provisions relating to consultation."¹⁸⁷

182. *Id.* at 1178 (citing *Thomas v. Peterson*, 753 F.2d 754, 763, 15 ELR 20225 (9th Cir. 1985) ("The strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements, because the procedural requirement are designed to ensure compliance with the substantive provisions"); *Forest Guardians v. Johanns*, 430 F.3d 455, 457, 36 ELR 20109 (9th Cir. 2006) (same); *Conner v. Burford*, 848 F.2d 1441, 1458 n.40, 18 ELR 21182 (9th Cir. 1988) (same)).

183. *Id.*

184. *Id.* In *Washington Toxics*, the wildlife agencies had argued, as the *Kemphorne* court later ruled, that because there was a statutory gap regarding the definition for "consultation," they *may* promulgate NLAA procedures permitting an action agency to determine that NLAA actions were not likely to jeopardize protected species without "consulting" with the Services. But see *infra* Section V.B.-C. (contending that pursuant to *Chevron*, the ESA cannot be read to demonstrate Congress' unambiguously expressed intent to permit such intraagency delegation). Cf. Section III.D.'s analysis of the problematic nature of the statutory construction rationales underlying the *Kemphorne* court's decision holding valid the NLAA regulatory revisions to the general consultation regulations.

185. *Washington Toxics*, 457 F. Supp. 2d at 1178-79.

186. *Id.* at 1179.

187. *Id.*

(1) The first internal indicator—that the “in consultation with” phrase is paired with “with the assistance of the Secretary”—“reinforces the notion that a section 7(a)(2) determination is not to be unilaterally made.”¹⁸⁸

As to the second and third internal factors, the court found that they—especially the second—“emphasize the rigor of the consultation contemplated by the statute.”¹⁸⁹ These latter two “internal indicators” of what Congress meant in ESA by “consultation” are:

(2) §7(b)(3)(A)’s requirement that upon concluding a §7(a)(2) consultation, the Services “shall provide to the Federal agency . . . a written statement setting forth the Secretary’s opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat”¹⁹⁰; and

(3) ESA §7(a)(2)’s own closing “admonition that ‘[i]n fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.’”¹⁹¹

In light of these factors, in its *Chevron* Step One analysis the *Washington Toxics* court did “not find that with the use of the word ‘consultation’ Congress left a ‘gap’ to be filled by the Services.”¹⁹² Thus, the court did not conclude that the plain meaning of “consultation” contemplated the joint creation of a process by which action agency EPA could unilaterally make the critical section 7(a)(2) determination regarding NLAA actions.¹⁹³ The court therefore invalidated the revised NLAA portions of the ESA/FIFRA counterpart regulations.¹⁹⁴

2. *Kemphorne* Court’s More Problematic Ruling That NLAA ESA/NFP Counterpart Regulatory Revisions Are Valid

Nowhere in its brief analysis of the validity of the challenged ESA/NFP counterpart revisions of the NLAA provisions did the *Kemphorne* court mention the existing 1986 ESA general or default regulations. To the contrary, the *Washington Toxics* court appropriately began its regulatory analysis of required ESA consultation duties by reiterating that these prior 1986 regulations “created three categories of federal agency action possibly requiring consultation: [LAA], [NLAA], and actions that will have no effect on listed species or critical habitat.”¹⁹⁵ The *Washington Toxics* court thus properly set forth at the outset of its analysis the correct regulatory framework for considering the ESA/FIFRA counterpart regulations challenges then pending before it: “LAA actions require formal consultation, while NLAA actions may fulfill the statutory and regulatory

requirements with a streamlined informal consultation. No consultation is required for actions that have no effect on listed species.”¹⁹⁶

As analyzed below, the *Kemphorne* court’s omitting consideration of this 1986 tripartite ESA consultation regulatory scheme¹⁹⁷ apparently led the Court to a problematic ruling upholding the revised NLAA procedures promulgated by the ESA/NFP counterpart regulations.

The *Kemphorne* court apparently went astray when discussing Congress’ passing ESA Amendments in 1978¹⁹⁸

196. *Id.*

197. Plaintiffs appear to have “dropped the ball” in that they did not sufficiently clarify for the *Kemphorne* court the relevant authorities setting forth the differing operative effects of the default regulations and the revised NLAA procedures they were challenging. The court noted, e.g., that plaintiffs did not rebut federal defendants’ arguments regarding these issues, but merely stated that the validity of the default procedures “‘are not under review in this case’ and that they ‘have not challenged those longstanding procedures.’” 2006 WL 2844232, at *19 (citing Plaintiffs’ Opposition and Reply, *Defenders of Wildlife v. Kemphorne*, 2006 WL 2844232 (D.D.C. Sept. 29, 2006) (No. 04-1230 (GK)). See also *supra* note 140.

198. These amendments created the 16 U.S.C. §1536(e)-(h) exemption possibility via the Cabinet-level committee (the “God squad”), that might now be convened in exceptional circumstances (but that did not exist at the time TVA was decided). This exemption-granting possibility was created in response to the Supreme Court’s holding in *TVA* that the absolute congressional mandate in ESA as it then existed left the Supreme Court no option but to enjoin operation of the dam. *Cf. Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 173, 8 ELR 20513 (1978) (“One would be hard pressed to find a statutory provision whose terms were any plainer than those in §7 of the Endangered Species Act. . . . This language admits of no exception.”). See *supra* note 140.

Thus, the “flexibility” that the *Kemphorne* court found in the House Report accompanying the bill and the floor statement of Sen. Lincoln Chaffee (R-R.I.) when the court stated the “amendments were designed, in part, to ‘introduce some flexibility into the Act’” were *rather* designed to introduce “flexibility” into the “not jeopardize” substantive requirement of §7—but not *also* into how or even if action agencies were to fulfill their procedural duties of consultation with the wildlife agencies. *Kemphorne*, 2006 WL 2844232, at *19 n.14 (citing H.R. REP. NO. 95-1625 (1978); 124 CONG. REC. 21147 (1978)); see also *supra* note 43.

The *Kemphorne* court’s only other use of ESA legislative history—the court’s reliance on which apparently also led the court to accept the wildlife agencies’ argument that they have the “flexibility” to promulgate the challenged NLAA consultation revisions—occurred immediately after the court’s concluding statement. “Plaintiffs’ broad interpretation of the term ‘consultation’ does not comport either with the plain meaning of the ESA or the legislative intent underlying it.” *Kemphorne*, 2006 WL 2844232, at *19 (citing 1978 U.S.C.C.A.N. (Rule 12.5) at 9462). Nevertheless, the portion of the H.R. REP. NO. 95-1625 (1978) cited by the court does not support the conclusion the court draws from it.

On the page the court cited, the report both underscored the importance of the action agencies’ fulfilling their consultation duties and discussed examples of a broad range of types of consultation that to date had properly ensued. H.R. REP. NO. 95-1625 (1978) (“The evidence presented to the Committee suggests that in many instances good faith consultation between the acting agency and the Fish and Wildlife Service can resolve many endangered species conflicts.”). Additionally, the fact that examples of time-consuming as well as routine “consultations” were given emphasized that, even if “consultations” were not “one size fits all,” the Committee Report evinced congressional intent that (1) they were significant; and (2) they were to occur. *Id.* (“Some consultations may amount to a simple inquiry whether a listed species is present in a project area.”).

Later, the report reiterated that “[s]ection 7(c)(2) defines the consultation process” in a manner emphasizing the procedural consultation requirement’s triggering significance in helping ensure that each federal agency fulfills its mandatory substantive §7(a)(2) duty to avoid jeopardy:

If the Federal action agency or the Secretary determines that a proposed action may affect a listed species or its habitat, im-

188. *Id.*

189. *Id.*

190. *Id.* (citing 16 U.S.C. §1536(b)(3)(A)).

191. *Id.* (citing 16 U.S.C. §1536(a)(2)).

192. *Id.*

193. *Id.*

194. *Id.* See *supra* note 151 and accompanying text.

195. *Washington Toxics*, 457 F. Supp. 2d at 1163 (citing Interagency Cooperation—Endangered Species Act of 1973, 51 Fed. Reg. 19926 (June 3, 1986)).

codifying the default procedures. In that part of its analysis, the *Kemphorne* court cited 50 C.F.R. §402.14, regarding action agencies' authority to determine in the first instance whether "any action may affect listed species or critical habitat" (sentence 1).¹⁹⁹ However, the court did not appear to credit the strict limits that authority established. For the condition the wildlife agencies placed upon exercise of that authority in the next following regulatory sentence is that "If such a determination is made [i.e., if an action agency's proposed action may affect a protected species], formal consultation is [generally] required. . . ." (sentence 2).²⁰⁰

The *Kemphorne* court should instead have read the requirements of sentences 1 and 2 together (not merely those of sentence 1). The court would likely then have focused on the fact that the action agency's authority in sentence 1 is not unbounded—but is rather subject to the significant limitation in sentence 2 that the action agency find that its proposed action has no effect on protected species. The *Kemphorne* court should have focused on this condition precedent, i.e., the condition that makes operative the action agency's authority to make a threshold "effects determination" without consultation with the Services. Had it done so, the court would likely not have inaccurately analogized the legal effects flowing from a "may effect" determination to those flowing from a no-effect determination.

The default (or general) regulations are clear that only if the action agency makes a no-effect determination does it have "no obligation" to consult with the wildlife agencies.²⁰¹ But the court wrongly concluded that the action agency making an NLAA determination also has no obligation to consult with the wildlife agencies:

Pursuant to the default consultation regime, which Plaintiffs favor, however, only the Action Agencies are responsible for making an initial determination as to whether a proposed action "may affect listed species or critical habitat." 50 C.F.R. §402.14. The Services play no role whatsoever in that threshold determination; if an Action Agency concludes that a proposed action will

mediate consultation shall be undertaken. The consultation will assist in the development of alternatives to the proposed action, and will result in a written biological opinion by the Secretary detailing whether the proposed action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of its critical habitat.

1978 U.S.C.C.A.N. 9470.

199. *Kemphorne*, 2006 WL 2844232, at *19 (citing 50 C.F.R. §402.14(a)).

200. 50 C.F.R. §402.14(a). The only occasions on which an action agency "need not initiate formal consultation" is if "as a result of the preparation of a biological assessment under §402.12 or as a result of informal consultation with the Service under §402.13," the action agency "determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat." *Id.*

201. *Cf.* ESA/FIFRA Counterpart Regulations, 69 Fed. Reg. at 47732. The §7 implementing regulations require:

[A]n action agency to complete formal consultation with the Service on any proposed action that may affect a listed species or critical habitat, unless following either a biological assessment or informal consultation with the Service, the action agency makes a determination that the proposed action is not likely to adversely affect any listed species or critical habitat and obtains written concurrence from the Service for the NLAA determination.

Id. (emphasis added).

have no effect on a listed species, it is under no obligation to consult with the Services.²⁰²

The court's last clause cited immediately above is an accurate statement of the action agency's legal duties arising as a consequence of making a no-effect determination, i.e., none. Any action agency concluding that its proposed action will have no effect on endangered or threatened species could not possibly by such action "likely jeopardize" the continued existence of any such species—so could not thereby trigger its ESA §7(a)(2) mandatory duty of consultation with the Secretary to avoid jeopardy.²⁰³

But, pursuant to the regulatory provision the *Kemphorne* court cited, any action agency making an initial determination that its proposed action "may affect listed species or critical habitat" certainly triggers its ESA §7(a)(2) mandatory duty of consultation with the Secretary to avoid jeopardy. Indeed, the may-affect determination is so strong a trigger of an action agency's duty to avoid jeopardy that generally formal consultation with the Service is necessary to discharge it.²⁰⁴ The sole purpose of all of these varying

202. *Kemphorne*, 2006 WL 2844232, at *19.

203. The situation of an agency taking a nondiscretionary action—specifically regarding the *Defenders of Wildlife* case presently pending before the Supreme Court, see *supra* note 13—has, e.g., recently been discussed in Steven G. Davison, *Federal Agency Action Subject to Section 7(a)(2) of the Endangered Species Act*, MO. ENVTL. L. & POL'Y REV., Fall 2006, at 29, and may be somewhat analogized to this. On the one hand, it seems sensible, as this commentator urges, that if an action agency has no discretion whether or not to take a proposed action, its taking that action should not trigger its ESA §7(a)(2) mandatory duty to avoid jeopardy. On the other hand, in the power-delegating context established by the ESA counterpart regulations wherein the wildlife agency voluntarily gave up its congressionally delegated role of expert consultant intended to ensure that all agencies fulfill their mandatory duties to avoid jeopardy to protected species to action agencies, a general conclusion that "the procedural and substantive requirements of §7(a)(2) of the ESA should apply only to an action of a federal administrative agency for which the agency has discretion to act in [a] manner that can protect ESA-listed species from the types of harm proscribed by section 7(a)(2) of the ESA" may not cut finely enough to forbid such action by the wildlife agencies. *Id.* at 29. See also *infra* Part V.B. and accompanying notes.

A narrower—and consequently arguably more appropriate result—resolving the issues presented by the *Defenders* case currently pending before the Court is suggested by the second part of the Court's own additional question that the Court specifically requested the parties brief. See *supra* notes 16, 19 and accompanying text. That is, if the Ninth Circuit "correctly held" that EPA's decision "to transfer pollution permitting authority to Arizona under the Clean Water Act . . . was arbitrary and capricious because it was based on inconsistent interpretations of Section 7(a)(2) of the Endangered Species Act of 1973," then, pursuant to required standards of judicial review long-established in 5 U.S.C. §706(2), the Court could—and arguably should—require in the first instance that the appellate court remand to the agency for further proceedings "without ruling on the interpretation of Section 7(a)(2)." *EPA v. Defenders of Wildlife*, 127 S. Ct. 853 (Jan. 5, 2007) (No. 06-549). Such a decision would moreover be consistent with the Court's prior practice in other significant administrative law cases of using its rulings to teach better APA practice to the lower appellate courts. See, e.g., *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 8 ELR 20288 (1978) (where commission had used statutory minimum, nothing in applicable statutes allowed court of appeals to overturn rulemaking proceeding on basis of procedural devices commission had used or not used).

204. 50 C.F.R. §402.14. That is, formal consultation to make the "effects determination" whether an action agency's proposed project will ultimately "not likely to adversely affect" or is "likely to adversely affect" protected species is triggered by an initial determination that the project "may affect" an endangered or threatened species. LAA status is generally confirmed after undergoing the ecological investigation entailed in formal consultation pursuant to 50 C.F.R. §402.14.

Thus, if a proposed project "may affect" a protected species, consultation (generally formal consultation) must be undertaken, partic-

levels of effects determinations—and the varying concomitant levels of consultation with which they are linked in the wildlife agencies' regulations—is to assist the action agencies in fulfilling their statutorily mandated substantive ESA §7 duty to avoid jeopardy to protected species.

It was thus a nonsequitur for the *Kemphorne* court to opine that the last clause cited above referencing an action agency's nonexistent obligation to consult with the Service if the agency makes a no-effect determination has any necessary correlation with an action agency's obligation to consult with the Service if the action agency makes a may-affect determination. Moreover, it was not the action agency's no-effect determinations and consequent actions that the *Kemphorne* plaintiffs challenged, but its NLAA determinations.²⁰⁵

Unaccountably, the *Kemphorne* court apparently elided the duties triggered by an action agency making an NLAA determination with those triggered by an action agency making a no-effect determination. The Court was thus led to an enthymematic rationale that—because in the formal consultation framework established by the default regulations an action agency may make no-effect determinations without having to engage in consultation with the expert wildlife agencies—an action agency operating under the revised procedures promulgated by the challenged counterpart regulations must also be able to make NLAA determinations without consultation with the wildlife agencies. This conclusion does not accord with the regulatory framework established by the 1986 ESA default consultation regulations.²⁰⁶

The *Kemphorne* court also apparently accepted wholesale the wildlife agencies' statutory construction arguments—notably, i.e., that because ESA does not define consultation, there is a gap to fill pursuant to a *Chevron* Step Two analysis. In so doing, the court ultimately did not appropriately credit the bedrock structural meaning of the expertise-sharing consultation designed by Congress in ESA §7(a)(2) to play a dispositive role in protecting endangered and threatened species.²⁰⁷

To be sure, Congress left a gap in the statute as to what precise mechanisms or procedures would constitute consultation. Pursuant to *Chevron*, such a gap could properly be filled by the wildlife agencies' promulgating ESA regulations to specify appropriate cooperative action agency mechanisms or procedures. In ESA §7, Congress did not specify what these procedures were to be but left their development to the sound discretion of the Services.

Nevertheless, in ESA §7 Congress left no gap whatsoever for the expert wildlife agencies to fill as to whether consulta-

tion between action agencies and the Services shall take place. It shall. Congress commanded it.²⁰⁸ The wildlife agencies have no discretion whatsoever to disobey the clear command of Congress that they consult with action agencies so that action agencies, in fulfilling their own ESA mandatory duties to avoid jeopardy to protected species,²⁰⁹ may do so only after having had the benefit of the Services' wildlife expertise.²¹⁰

Because the statute is not subject to conflicting interpretations on this point, the *Kemphorne* court should not have (as plaintiffs had correctly argued) reached the analytical level of *Chevron* Step Two to decide plaintiffs' challenges to the ESA/NFP regulations. As the *Washington Toxics* court did, the *Kemphorne* court should also have resolved the ESA §7(a)(2) statutory construction issues raised by plaintiffs' claims at the only appropriate level of analysis for congressional "signs" or "signals" manifesting so clear an intent as "shall" does, i.e., at the Step One level at which a court must invalidate an agency's statutory interpretation that conflicts with the unambiguously expressed intent of Congress.²¹¹

V. ESA Does Not Delegate to Wildlife Agencies the Authority Further to Delegate Their Mandatory Duty to Consult With Action Agencies to Action Agencies

A. *Kemphorne* Court Did Not Apply Requisite D.C. Circuit *Chevron/Delegation Analysis Before Undertaking Chevron Step Two Analysis*

As discussed in the Part IV.C. analysis above,²¹² the *Kemphorne* court ostensibly took care to apply the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit's substantive—and extensive—jurisprudence regarding the proper level of deference to be shown by a court at the *Chevron* Step Two level of analysis, namely, when an agency has reasonably decided how to fill a gap left by Congress in a statute the agency administers. Nonetheless, in so doing the *Kemphorne* court omitted consideration of that portion of the D.C. Circuit's *Chevron* jurisprudence reiterating that delegation concerns must as a threshold matter be resolved before a court may simply grant an agency the considerable amount of deference customarily afforded in judi-

ularly to establish required mitigation procedures, if it in fact proves that the proposed action is "likely to adversely affect" protected species (or until it is demonstrated that the proposed action is either "not likely to adversely affect" or would have "no effect" on protected species). See text and accompanying notes at Part III.A., *supra*.

205. As do the *Washington Toxics* plaintiffs, regarding the wildlife agencies' revisions to the analogous NLAA process established by the ESA/FIFRA counterpart consultation regulations.

206. Interagency Cooperation—Endangered Species Act of 1973, 51 Fed. Reg. 19926 (June 3, 1986) (codified at 50 C.F.R. pt. 402).

207. *But cf.* *Washington Toxics Coalition v. Department of the Interior*, 457 F. Supp. 2d 1158, 1177, 36 ELR 20190 (W.D. Wash. 2006) (wildlife agencies may not "abdicate their consultative role in formulating the conclusion that an [action agency's proposed] action is 'not likely to jeopardize' protected species).

208. 16 U.S.C. §1536(a)(2) ("Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species . . .").

209. *Cf.* *Michigan v. EPA*, 268 F.3d 1075, 1081, 32 ELR 20248 (D.C. Cir. 2001) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch), 137, 176 (1803)) (vacating EPA rule that EPA exceeded its authority in promulgating) ("It is elementary that our federal government is one of limited and enumerated powers. . . . This principle applies with equal force to the so-called modern administrative state. . . . [A] federal agency . . . has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.").

210. *Accord* *Bennett v. Spear*, 520 U.S. 154, 27 ELR 20824 (1997) ("[The action agency] must not only articulate its reasons for disagreement (which ordinarily requires species and habitat investigations that are not within the action agency's expertise), [but also] runs a substantial risk if its (inexpert) reasons turn out to be wrong.").

211. See *Chevron*, 467 U.S. at 845 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."); see also *supra* notes 1, 17.

212. See *supra* notes 164-71 and accompanying text.

cial review of agencies' reasonable statutory constructions at that *Chevron* Step Two level of analysis.²¹³

In both *Michigan v. U.S. Environmental Protection Agency*²¹⁴ and *Atlantic City Electric Co. v. Federal Energy Regulatory Commission*,²¹⁵ for example, the D.C. Circuit invalidated, respectively, both an agency rulemaking and an agency final order because the agency's final action had exceeded the bounds of its delegated authority. In so doing, the D.C. Circuit did not—as indeed it would not have had the authority to do—attempt to refine the *Chevron* Step One analysis.

However, in *Atlantic City Electric Co.*, the D.C. Circuit set forth a detailed account of the delegation analysis²¹⁶ that courts must satisfy before moving on from that Step One level, that is, before a court could properly conclude that the court had fully satisfied the Step One level and discerned whether the unambiguously expressed intent of Congress was to delegate authority for an agency to fill a gap in a statute. Explicitly relying on numerous of its prior authorities, the D.C. Circuit in *Atlantic City Electric Co.* essentially created a consolidated “delegation checklist” for courts' use in ensuring that a challenged agency statutory interpretation actually evinced an intended congressional delegation of authority to the agency. Thus, before moving on to the *Chevron* Step Two level of analysis—in consequence of which a court must then accord the agency's disputed statutory construction the full measure of Step Two deference²¹⁷—district courts in the D.C. Circuit must analytically have engaged and satisfied certain specific delegation inquiries.²¹⁸

213. *Cf. Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194, 8 ELR 20513 (1978) (“Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.”).

214. 268 F.3d 1075, 1081-82, 32 ELR 20248 (D.C. Cir. 2001).

215. 295 F.3d 1, 8 (D.C. Cir. 2002) (finding that Agency did not have statutory authority to require utilities to cede statutory rights under Federal Power Act to file changes in rate design).

216. *See infra* note 218.

217. *Cf. Chevron*, 467 U.S. at 843-44:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

218. (1) As a threshold matter, the D.C. Circuit emphasized that “[t]o determine whether the agency's action is contrary to law, we look first to determine whether Congress has delegated to the agency the legal authority to take the action that is under dispute.” *Atlantic City*, 295 F.3d at 8 (citing *Michigan*, 268 F.3d at 1081 (citations omitted)).

(2) However, at the *Chevron* Step One level, “even if an agency possesses delegated authority, if ‘Congress has directly spoken to the precise question at issue,’ a court ‘must give effect to the unambiguously expressed intent of Congress,’ and that ‘ends’ the court's inquiry.” *Id.* (citing *Chevron*, 467 U.S. at 842-43).

(3) But, even at the *Chevron* Step Two level, “[t]he agency's interpretation of the statute is entitled to deference *only if it is* ‘reasonable and consistent with the statute's purpose.’” *Id.* (citing *Independent Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 643 (D.C. Cir. 2000)) (emphasis added).

(4) Nevertheless, “[m]ere ambiguity in a statute is not evidence of congressional delegation of authority” in the first instance.” *Id.* at 8-9 (citing *Michigan*, 268 F.3d at 1082).

(5) That is, analytically, the *Chevron* Step Two level of “deference comes into play of course, only as a consequence of statutory ambiguity, and then *only if* the reviewing court finds an implicit delegation of authority to the agency.” *Id.* at 9 (citing *Sea-Land Serv.,*

In its analysis upholding the challenged NLAA regulatory revisions promulgated in the ESA/NFP counterpart regulations, the *Kemphorne* court neither engaged the delegation analysis required by nor explicitly considered the relevant D.C. Circuit authorities. The court did not, for example, specifically analyze whether the gap the court found in ESA—that the statute did not define the term consultation—as a matter of law explicitly delegated authority to the Services further to delegate the NLAA portions of the Services' consultation authority to EPA.²¹⁹

The *Kemphorne* court evidently went astray in its *Chevron*/delegation analysis at (3) and (4) of the D.C. Circuit's delegation checklist.²²⁰ First, the *Kemphorne* court did not make the determination the D.C. Circuit had specified is necessary as set forth in (3), that the agency's interpretation of the statute was “consistent with the statute's purpose.”²²¹ Indeed, considering the significant protections ESA affords endangered and threatened species and the strongly operative legal effects of the statute,²²² it appears highly unlikely that the *Kemphorne* court could have made such a determination—particularly after the court admitted “shar[ing] many of Plaintiffs' concerns about the wisdom and efficacy of the Counterpart Regulations.”²²³

Moreover, as set forth in (4), the *Kemphorne* court evinced no analysis engaging the D.C. Circuit's *Chevron*/delegation required standards before reaching the Step Two level²²⁴—so therefore neither satisfied nor distin-

Inc. v. Department of Transp., 137 F.3d 640, 645 (D.C. Cir. 1998)) (emphasis added).

(6) In addition, “[a]gency authority may not be lightly presumed. Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* [, *Mead*,] and quite likely with the Constitution as well.” *Id.* (citing *Michigan*, 268 F.3d at 1082 (citations omitted)).

(7) Therefore, the court is “not [to] presume a delegation of power based solely on the fact that there is not an express withholding of such power.” *Atlantic City*, 295 F.3d at 9 (quoting *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060, 25 ELR 20817 (D.C. Cir. 1995) (citations omitted)).

219. The analysis given *infra* Section IV.D.1. contends that it did not. As discussed above, the *Washington Toxics* court ruled that it did not. *See supra* notes 172-94 and accompanying text. *But see Kemphorne*, 20006 WL 2844232, at *18 (“While Plaintiffs argue that the first step of *Chevron* should govern the analysis here, there can be no question that this is not a step-one case.”).

220. *See supra* note 218.

221. *Atlantic City*, 295 F.3d at 8 (citing *Independent Ins. Agents*, 211 F.3d at 643); *cf. Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180, 8 ELR 20513 (1978) (“[T]he ESA's stated purposes were ‘to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,’ and ‘to provide a program for the conservation of such . . . species . . .’” (citing 16 U.S.C. §1531(b))).

222. *See, e.g., TVA*, 437 U.S. at 184 (“The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever its cost.”); *see also Washington Toxics Coalition v. Department of the Interior*, 457 F. Supp. 2d 1158, 1177 n.13, 36 ELR 20190 (W.D. Wash. 2006) (“TVA's strong rhetoric still lives.”).

223. *Kemphorne*, 2006 WL 2844232, at *19 n.17.

224. The *Kemphorne* court's Step One analysis summarizing the court's conclusion that it “must proceed to the second step of the *Chevron* analysis” comprises three sentences:

A definition of “consultation” is not provided in [ESA §7], nor elsewhere in the ESA. Furthermore, Section 7 is completely silent on both the mechanics and details of the “consultation” it requires. Here, Congress has not “spoken to the precise question at issue” . . . but has instead “left a gap for the agency to fill.”

Id. at *18 (citations omitted).

guished the D.C. Circuit's determination that "[m]ere ambiguity in a statute is *not* evidence of congressional delegation of authority' in the first instance."²²⁵ Contra to the express D.C. Circuit mandate as set forth in (7), the *Kemphorne* court thus finally appeared merely "to presume a delegation of power"²²⁶ to the Services to promulgate the challenged regulations based solely on the fact that ESA did not "express[ly] withhold[]" power for the Secretary to do so.²²⁷

Thus—pursuant to the D.C. Circuit's binding authorities regarding the analysis a court must make to resolve *Chevron*/delegation issues *before* a court may reach the deferential *Chevron* Step Two level of analysis—the *Kemphorne* court failed. In judicial review of the Services' disputed construction of ESA §7, the *Kemphorne* court offered no analysis whatsoever on key aspects of these required D.C. Circuit standards before applying the *Chevron* Step Two level of deference and upholding the challenged ESA/NFP regulations.

The *Kemphorne* court consequently prematurely (and conclusorily) accorded too much deference to the statutory construction that the wildlife agencies had relied upon when promulgating regulatory revisions to the ESA default regulations' NLAA procedures for effects determinations for threatened and endangered species. The dispositive "hinge" for the *Kemphorne* court in this matter—pursuant to the requisite D.C. Circuit analysis—should *not* have been, as it was, merely whether Congress "'entrusted the Secretary with broad discretion' to administer the statute."²²⁸ Of course Congress did that.²²⁹

The requisite inquiry the *Kemphorne* court should have made is the one the D.C. Circuit had prescribed to be made—while *not* "lightly presum[ing] agency authority,"²³⁰ whether the gap Congress left in ESA by requiring action agencies' consultation with the Services without defining consultation evinced "solely" that there was "not an express withholding of power."²³¹ Not having made this inquiry, the *Kemphorne* court should not have—as it apparently did—merely presumed that in ESA Congress delegated authority to the Secretary to promulgate the NLAA counterpart ESA/NFP revisions to the interagency consultation procedures established by the prior default regulations.

B. Congressional Mandate That Action Agencies "Shall, in Consultation With and With the Assistance of the Secretary, Insure" Cannot Grammatically Be Construed to Mean "Action Agencies Have Discretion Not to Consult With the Secretary"

The proper *Chevron* analysis of the interpretation of the statutory term "consultation" must proceed at the Step One, not

Step Two, level.²³² This section of the Article further demonstrates why the *Washington Toxics* court's statutory construction forming the basis of the court's *Chevron* Step One ruling invalidating the NLAA counterpart ESA regulatory revisions is correct, and the *Kemphorne* court's *Chevron* Step Two ruling validating analogous NLAA counterpart revisions is not.

As analyzed immediately and in Part V.C. below, when action agencies propose to undertake construction projects that may harm protected species, Congress in ESA did not afford the Secretary the discretion not to consult with action agencies but rather ordered the Secretary to do so to provide action agencies the benefit of the Secretary's wildlife expertise. Nor did Congress therein grant action agencies the authority to act solipsistically as expert wildlife agency consultants unto themselves.

1. Plain Meaning of Congressional Mandate "Shall, in Consultation With and With the Assistance of the Secretary, Insure"

A decade ago in *Bennett*, the Supreme Court opined that "any contention that the relevant provision of [ESA §7(a)(2)] is discretionary would fly in the face of its text, which uses the imperative 'shall.'"²³³ This imperative "shall," with "insure," is the verb—where "each Federal agency" is the subject—in the statutory phrase beginning ESA §7(a)(2), "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure. . . ."²³⁴

As depicted on the following figure, the compound prepositional phrases that Congress inserted into the statutory text between the two parts of the verb, "shall" and "insure," equally modify that verb. That is, each federal agency "in consultation with the Secretary" "shall insure"—*and* each federal agency "with the assistance of the Secretary" "shall insure"

that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.²³⁵

In construing the plain meaning of the statutory phrase italicized above, vis-à-vis the duties appertaining therein to either "each Federal agency" or "the Secretary," the significance of the second set of compound prepositional phrases—"with the Secretary" and "of the Secretary"—is even greater than that of the first—"in consultation" and "with the assistance." Both the "consulting" with and the "assistance" to be had must be granted *from* the Secretary to each federal agency. The opposite relation could not within the strictures of the English language be signified by this grammatical structure.

225. *Atlantic City*, 295 F.3d at 8-9 (citing *Michigan v. EPA*, 268 F.3d 1075, 1082, 32 ELR 20248 (D.C. Cir. 2001)).

226. *Id.* at 9 (quoting *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060, 25 ELR 20817 (D.C. Cir. 1995) (citations omitted)).

227. *Id.* (quoting *Ethyl Corp.*, 51 F.3d at 1060 (citations omitted)).

228. *Id.* at *19 n.17.

229. 16 U.S.C. §1540(f) ("[The Secretary is] authorized to promulgate such regulations as may be appropriate to enforce this chapter.").

230. *Atlantic City*, 295 F.3d at 9 (citing *Michigan*, 268 F.3d at 1082 (citations omitted)).

231. *Id.* (quoting *Ethyl Corp.*, 51 F.3d at 1060 (citations omitted)).

232. See *supra* notes 172-94, 207-11 and accompanying text.

233. 520 U.S. at 173.

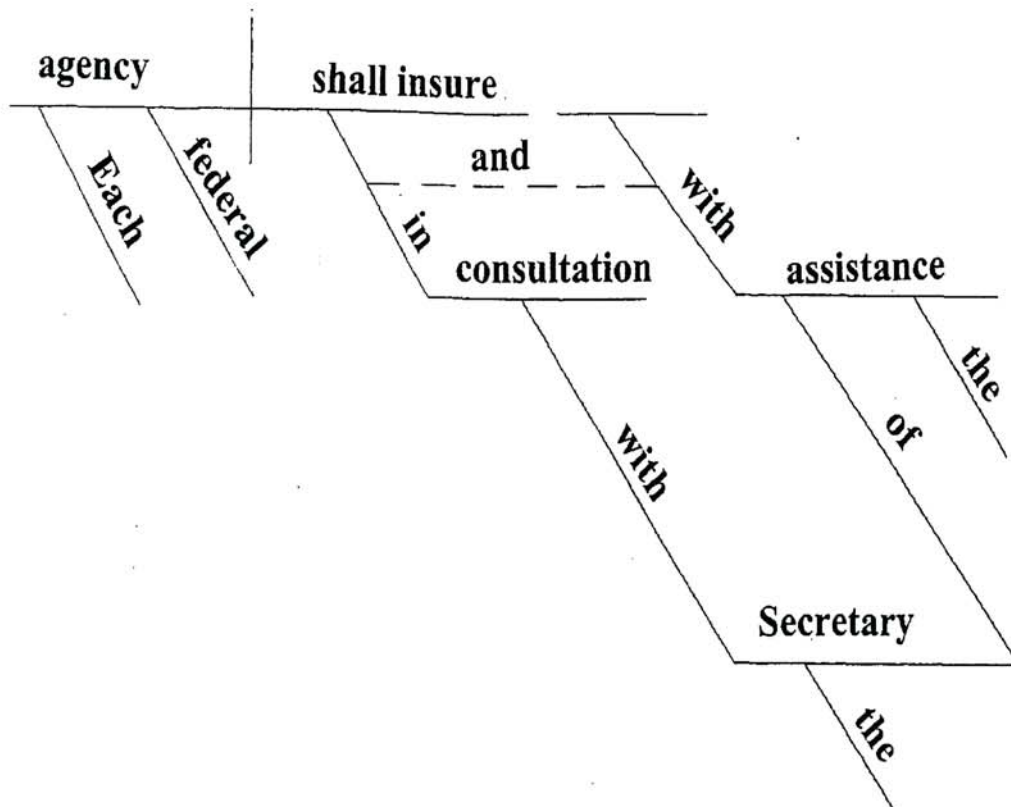
234. 16 U.S.C. §1536(a)(2).

235. *Id.*

Chart E

Diagram Illustrating the Plain Meaning of the First Clause of ESA § 7(a)(2) :

“Each Federal agency shall, in consultation with and with the assistance of the Secretary insure” *



*“Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species ...” 16 U.S.C. § 1536 (a)(2).

2. Purpose of ESA

In enacting ESA, Congress sought to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species.”²³⁶ Congress specifically declared that such species are of “esthetic, ecological, educational, historical, recreational, and scientific value” to the United States.²³⁷

Over a decade ago in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,²³⁸ the Supreme Court reiterated the “importance of the statutory policy” for “[b]oth our holding and the language in” *TVA* (which at that time had been decided almost a decade before). In *TVA*, the Supreme Court had opined: “The plain intent of Congress in enacting this statute” was “to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.”²³⁹

Had the wildlife agencies correctly assessed the significance of ESA’s strong statutory purposes and congressionally prescribed policies to preserve endangered and threatened species against extinction—“whatever the cost”—it is unlikely that they would have based a significant portion of their justifications for promulgating ESA counterpart regulations on rationales highlighting the likely efficiencies gained from doing so in other federal programs.²⁴⁰

3. Structure of ESA

In enumerating several of ESA’s strongest provisions reflecting the statute’s congressionally instilled bias toward conservation of endangered and threatened species, in *TVA* the Supreme Court particularly had noted these three:

236. 16 U.S.C. §1531(b); *accord* National Wildlife Fed’n v. Coleman, 529 F.2d 359, 6 ELR 20344 (5th Cir. 1976) (reversing district court’s dismissal of suit to enjoin construction of interstate highway section that would cross habitat of sandhill crane; holding that the U.S. Department of Transportation had duty under the ESA to insure that proposed highway and development generated by it did not further threaten protected species or habitat, irrespective of past destructive acts of others).

237. 16 U.S.C. §1531(a)(3).

238. 515 U.S. 687, 699, 25 ELR 21194 (1995). *Sweet Home* incidentally highlighted the extent to which *TVA* dissenting Justice Lewis Powell miscalculated the likely “expeditious” congressional response to the Court’s ruling in *TVA*, i.e., in 17 years Congress had not “amend[ed] [ESA] to prevent the grave consequences made possible by [the *TVA*] decision” (as Justice Powell had “anticipated” Congress would do “expeditiously”). *Tennessee Valley Auth. v. Hill*, 437 U.S. 152, 210, 8 ELR 20513 (1978) (Powell, J., dissenting); *see also infra* note 249 and accompanying text.

239. *Sweet Home*, 515 U.S. at 699 (citing *TVA*, 437 U.S. at 184).

240. *See, e.g.*, ESA/NFP Counterpart Regulations, 68 Fed. Reg. at 68257 (“Streamlining the NLAA concurrence process offers a significant opportunity to accelerate NFP projects. . . .”); *see also* ESA/FIFRA Counterpart Regulations, 69 Fed. Reg. at 47736:

Finally, given the importance of maintaining the availability of pesticides for production of food and fiber, disease prevention and other purposes that are essential to the health and well-being of the American people, EPA and the Services believe that improved integration of the FIFRA registration/reregistration and section 7(a)(2) consultation processes under new counterpart regulations will be achieved in a way that avoid unnecessary burdens on pesticide users with no sacrifice to the protection of listed species.

(1) the ESA §9 prohibition applicable to “any person” against “taking” an endangered species²⁴¹;

(2) the congressional direction to agencies to use “all methods and procedures which are necessary” to preserve endangered species²⁴²; and

(3) ESA §7, since “the legislative history undergirding §7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species.”²⁴³

In a similar vein, as discussed above, the *Washington Toxics* court analyzed three “highly relevant” internal statutory indicators demonstrating in the following two ways the congressional intent that the statutorily required consultation with the Secretary of the wildlife agencies specified a species-protective function that could not simply be omitted at will by agency actors:

(1) that the §7(a)(2) determination “is not to be unilaterally made”²⁴⁴; and

(2) that two other §7 provisions in proximity to the §7(a)(2) mandatory duty to avoid jeopardy also “emphasize the rigor of the consultation contemplated by the statute.”²⁴⁵

In light of such highly specific provisions throughout ESA recognized for decades by courts as irrefutably establishing the highest priority for protection of endangered and threatened species, it strains credulity for the wildlife agencies to have promulgated procedures passing their own ESA authority to make NLAA determinations to action agencies with such generalized assurances as that “the Action Agencies are committed to implementing this authority in a manner that will be equally as protective of listed species and designated critical habitat as the current procedures that require written concurrence from the Service.”²⁴⁶ Since action agencies may now when using the revised counterpart procedures consult only with themselves on individual NLAA determinations, such conclusory assertions of the wildlife agencies ring hollow. Certainly they do not on their face establish that the revised structural counterpart framework will be equally as protective as when the wildlife agencies themselves also did an independent assessment and concurred in writing on action agencies’ proposals.²⁴⁷

241. *TVA*, 437 U.S. at 184 (citing 16 U.S.C. §§1532(14), 1538(a)(1)(B)).

242. *Id.* (citing 16 U.S.C. §§1531(c), 1532(2)) (emphasis added by Supreme Court).

243. *Id.*

244. *Washington Toxics*, 457 F. Supp. 2d at 1179 (citing 16 U.S.C. §1536(a)(2)).

245. *Id.* (citing 16 U.S.C. §§1536(b)(3)(A), 1536(2)(a)).

246. ESA/NFP Counterpart Regulations, 68 Fed. Reg. at 68257. *But cf. Washington Toxics*, 457 F. Supp. 2d at 1179 (invalidating NLAA ESA/FIFRA regulatory revisions because “the Court cannot conclude that the plain meaning of ‘consultation’ contemplates the joint creation of a process by which action agencies may unilaterally make the critical section 7(a)(2) determination regarding NLAA actions”).

247. To the contrary, one commentator has specifically highlighted why action agency EPA’s office responsible for pesticide registration has “long had a reputation for being industry-friendly”:

EPA has consistently resisted ESA consultation in any form on its pesticide decisions, maintaining that its FIFRA analysis adequately accounts for all environmental impacts. Experience suggests otherwise, however. Pesticide-related impacts are cited by the regulatory agencies as threats to species

4. Legislative History of ESA

In *TVA*, the Supreme Court reiterated that “[w]hen confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning,” and “[h]ere it is not necessary to look beyond the words of the statute.”²⁴⁸ Nevertheless, the Court undertook an analysis of ESA’s legislative history “only to meet Mr. Justice POWELL’s suggestion that the ‘absurd’ result reached in this case,” i.e., not opening a \$100 million dam, “is not in accord with congressional intent.”²⁴⁹ To the contrary, the Court emphasized that ESA’s 1973 legislative history was “replete with expressions of concern over the risk that might lie in the loss of any endangered species.”²⁵⁰

5. Legislative History Regarding ESA’s Relative Force Vis-à-Vis Other Statutes

For example, the U.S. House of Representatives’ manager of the bill that became the 1973 ESA, Rep. John Dingell (D-Mich.), made it “clear that the mandatory provisions of §7 were not casually or inadvertently included, but instead substantially amplified the obligation of [federal agencies] to take steps within their power to carry out the purposes of [ESA]”²⁵¹:

Another example [has] to do with the continental population of grizzly bears which may or may not be endangered, but which is surely threatened. . . . Once this bill is enacted, the appropriate Secretary, whether of Interior, Agriculture, or whatever, *will have to take action* to see that this situation is not permitted to worsen, and that these bears are not driven to extinction. The purposes of the bill included the conservation of the species and of the ecosystems upon which they depend, and *every agency of government is committed* to see that those purposes are carried out²⁵²

in roughly 15% of species listing and critical habitat designations. An outside report in 2002 was highly critical of EPA’s process for reviewing the ecological impacts of pesticides. One of the comments on the Joint Counterpart Regulations captures the essence of environmentalist concerns; “EPA fails to apply the precautionary principle to its regulation pesticides. EPA assumes no risk to listed species when EPA lacks data.” Environmentalists believe, with good reason, that EPA will impose a higher standard of proof of adverse effects than FWS would as a prerequisite to formal consultation.

Holly Doremus, *Science Plays Defense: Natural Resource Management in the Bush Administration*, 32 *ECOLOGY L.Q.* 249, 285-86 (citing Joint Counterpart Regulations, 68 Fed. Reg. at 68259) (footnote numbers omitted).

248. 437 U.S. at 184 (citing *Ex Parte Collett*, 337 U.S. 55, 61 (1949)).

249. *Id.* at 178.

250. *Id.* at 185.

251. *Id.* at 183-84 (citing 119 CONG. REC. 42913 (daily ed. Dec. 20, 1973)); accord *Conservation Council for Hawaii v. Babbitt*, 2 F. Supp. 2d 1280 (D. Haw. 1998) (finding arbitrary and capricious the wildlife agency’s decision not to designate critical habitats for listed plant species under the ESA, because, since plants were located on private lands, designation would presumably result in little benefit; agency’s decision contravened congressional intent, inter alia, to include benefits of designation applying to future federal activity on private property).

252. 119 CONG. REC. 42913 (daily ed. Dec. 20, 1973), cited in *TVA*, 437 U.S. at 183-84 (emphasis added by Supreme Court); accord *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 24 ELR 21367 (9th Cir.

Therefore, Representative Dingell concluded, once ESA §7 were enacted, “the agencies of Government can no longer plead that they can do nothing about [the conservation of species and ecosystems]. *They can, and they must. The law is clear.*”²⁵³

A “similar example” (also involving grizzly bears) provided by the House Committee Report was taken by the *TVA* Court as further evidence of the absolute clarity of Congress’ intent in §7 to prioritize the ecological needs of species first over other delegated agency missions:

Under the authority of [§7], the Director of the Park Service would be required to conform the practices of his agency to the need for protecting the rapidly dwindling stock of grizzly bears within Yellowstone Park. These bears, which may be endangered, and are undeniably threatened, should at least be protected by supplying them with carcasses from excess elk within the park, by curtailing the destruction of habitat by clearcutting National Forests surrounding the Park, and by preventing hunting until their numbers have recovered sufficiently to withstand these pressures.²⁵⁴

After analyzing the 1973 ESA’s extensive legislative history—and parsing the “pointed omission of the type of qualifying language previously included in endangered species legislation”—the *TVA* Court opined that Congress made a “conscious decision” in ESA to “give endangered species priority over the ‘primary missions’ of federal agencies.”²⁵⁵

Apparently heedless of the strength of this precedent emphasizing the strong congressional intent to protect species that recurs throughout both the statutory provisions and the legislative history of their development, the wildlife agencies promulgated the ESA counterpart consultation regulations seeking therein to balance the needs of FIFRA or NFP programs with those of ESA—to the point, as discussed above, that the wildlife agencies even voluntarily relinquished to action agencies their own expertise and authority to make final NLAA determinations. In doing so, the wildlife agencies apparently gave too short shrift to both congressional commands and the strength of the Supreme Court’s ESA teachings.²⁵⁶

1994) (finding that despite fact that U.S. Forest Service adopted land resource management plans before chinook salmon was listed as threatened species, plans for timber sales, range activities, and road building in two forests were “ongoing agency action” under the ESA where they had long-lasting effects on species after adoption; enjoining Agency from proceeding with such planned projects before Agency’s ESA §7 consultation with appropriate Service).

253. 119 CONG. REC. 42913 (daily ed. Dec. 20, 1973), cited in *TVA*, 437 U.S. at 184 (emphasis added by Supreme Court).

254. H.R. REP. NO. 93-412, at 14 (1973), cited in *TVA*, 437 U.S. at 187; cf. *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297, 301-02, 22 ELR 20372 (9th Cir. 1991) (affirming district court’s determination that classifying spotted owl as endangered under the ESA did not excuse U.S. Forest Service from its obligation also to provide for owl pursuant to National Forest Management Act’s provisions regarding maintenance of viable species).

255. *TVA*, 437 U.S. at 185; see also *Defenders of Wildlife v. Administrator*, 882 F.2d 1294, 19 ELR 21440 (8th Cir. 1989) (finding that although FIFRA is the exclusive means of canceling a pesticide’s registration, holding that citizen suit alleging that EPA violated the ESA by continuing to register strychnine pesticides was not barred, even if subsequent finding of EPA violation could incidentally cause EPA to cancel registration).

256. See, e.g., *Washington Toxics Coalition v. Department of the Interior*, 457 F. Supp. 2d 1158, 1177 n.13, 36 ELR 20190 (W.D. Wash. 2006) (“*TVA v. Hill*’s strong rhetoric lives.”).

6. Legislative History Regarding ESA's Force Vis-à-Vis FIFRA.

In promulgating the ESA/FIFRA regulations, the wildlife agencies stated that Public Law No. 100-478 “provided a clear sense that Congress desires that EPA should fulfill its obligation to conserve listed species, while at the same time considering the needs of agriculture and other pesticide users.”²⁵⁷ Nevertheless, as analyzed below, it is at best a considerable overstatement to take that sort of “clear sense” of congressional intent from the legislative history of Public Law No. 100-478.

For Public Law No. 100-478 emphatically did not disturb the highest priority the *TVA* Court had previously concluded that it was Congress’ intent in ESA to require all federal agencies to observe, i.e., while fulfilling their primary missions, they also act to promote conservation of endangered and threatened species. Nor did this public law specifically make any exception that would have somehow allowed action agency EPA to balance strict compliance with the ESA’s protective requirements with “the needs of agriculture and other pesticide users.”²⁵⁸

Rather, Public Law No. 100-478, the 1988 appropriations bill that amended the ESA to facilitate species recovery and strengthen protections for endangered plants, also authorized certain funds for education, study, and a report relating to the endangered species pesticides registration program.²⁵⁹ The legislative history for this appropriations request moreover makes it quite clear that Sen. Pat Roberts

(R-Kan.), the sponsor of the request, did not intend its authorization to change in any way EPA’s obligations to comply with all substantive ESA requirements.

For example, during the reading of the bill, Mr. Jones of North Carolina specifically asked Senator Roberts: “[D]o your perfecting amendments also clarify that the [proposed] study of the economic impacts of the endangered species pesticide labeling program under no circumstances alleviate the EPA’s need to comply with [the ESA]?”²⁶⁰

Senator Roberts replied: “Yes, it is not the purpose of this amendment to discourage [EPA] from complying with the mandate of [the ESA].”²⁶¹ In subsequently discussing his amendment, Senator Roberts categorically stated “that under no circumstances does my amendment delay, or lessen the need for the EPA to fulfill their responsibilities under [the ESA].”²⁶²

In further explaining why he was proposing a study of the “economic impact and anticipated benefits”²⁶³ of the pesticide labeling program’s compliance with ESA mandates, Senator Roberts made clear that he expected any post-study congressional actions designed “to accommodate the impending necessary pesticide [program] changes” resulting from ESA compliance to be made by and in federal programs other than the ESA:

The EPA has provided no information regarding actual, expected, or potential economic impacts of the endangered species pesticides labeling program. Without this kind of information it is impossible for this Congress, or other Federal agencies, to lessen any economic blow this program may generate. It is my hope that we may be able to modify or expand existing programs administered by the Department of Agriculture, or the Department of the Interior, or EPA, so that adversely affected pesticide users, and landowners in particular, can accommodate the impending necessary pesticide changes. For example, the Conservation Reserve Program may be expanded to prioritize enrollment of affected landowners, or perhaps affected lands could be prioritized for acquisition by Federal land management agencies. These and certainly many other ideas should be explored and evaluated for their merits.²⁶⁴

Such is the discussion concerning Senator Roberts’ 1988 appropriations request for education, study, and a report that the wildlife agencies relied upon in the preamble to the ESA/FIFRA counterpart regulations for a “clear sense” that EPA should fulfill its ESA obligations “while at the same time considering the needs of agriculture and other pesticide users.”²⁶⁵ To the contrary, it was not reasonable for the wildlife agencies to have relied on their reading of such legislative history as the basis, in promulgating the ESA/FIFRA NLAA regulatory revisions, for that part of their rationales justifying giving the final agency decision in NLAA actions to EPA because “improved integration of the FIFRA registration/reregistration and section 7(a)(2) consultation processes under new counterpart regulations will be achieved

257. ESA/FIFRA Counterpart Regulations, 69 Fed. Reg. at 47735.

258. *Id.* at 47732.

259. *Id.* at 47735; *see also* Act of Oct. 7, 1988, Pub. L. No. 100-478, 102 Stat. 2306, §1010(a)-(c). Section 1010(a), entitled “Education,” provided that the EPA Administrator, in cooperation with the Secretary of Agriculture and the Secretary of the Interior, “shall conduct a program to inform and educate fully persons engaged in agricultural food and fiber commodity production of any proposed pesticide labeling program or requirements that may be imposed by the Administrator in compliance with the [ESA].” *Id.*

This section further even cabined the otherwise required provision of specified public information with an exception that EPA must exercise on behalf of the Secretary of the Interior if needed to prevent “substantial risk of harm” to protected species or habitats, specifying that the EPA Administrator

shall provide the public with notice of, and opportunity for comment on, the elements of any such program and requirements based on compliance with [ESA], including (but not limited to) an identification of any pesticides affected by the program . . . unless the Secretary of the Interior determines that the disclosure of such information may create a substantial risk of harm to such species or its habitat.

Id.

Section 1010(b), entitled “Study,” provided that the EPA Administrator, jointly with the Secretary of Agriculture and the Secretary of the Interior, “shall conduct a study to identify reasonable and prudent means available to the Administrator to implement the endangered species pesticides labeling program which would comply with [ESA], and which would allow persons to continue production of agricultural food and fiber commodities.” *Id.*

This study “shall include, [e.g.,] investigation by the Administrator of the best available methods to develop maps and the best available alternatives to mapping as means of identifying those circumstances in which use of pesticides may be restricted . . .” *Id.*

Section 1010(c), entitled “Report,” required the Administrator of EPA, in cooperation with the Secretary of Agriculture and the Secretary of the Interior, to submit a report presenting the results of the study conducted pursuant to §1010(b) above. *Id.* EPA drafted “Report to Congress on Endangered Species Protection Program as It Relates to Pesticide Regulatory Activity” in 1991.

260. 133 CONG. REC. H11248 (daily ed. Dec. 11, 1987).

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. ESA/FIFRA Counterpart Regulations, 69 Fed. Reg. at 47735.

in a way that avoids unnecessary burdens on pesticide users with no sacrifice to the protection of listed species.”²⁶⁶

ESA does not authorize the wildlife agencies to balance or weigh any such factors as avoiding “unnecessary burdens on pesticide users.” Rather, it evinces throughout a congressional policy of placing the highest priority on implementing “institutionalized caution” in all matters affecting protected species.²⁶⁷

C. Congress’ Definition of “Secretary” Does Not Permit Intraagency Delegation of Expert Wildlife Agencies’ ESA §7 Mandatory Duty of Consultation to Action Agencies

Since *Marbury v. Madison*²⁶⁸ and *Kendall v. United States ex rel. Stokes*,²⁶⁹ it has been bedrock constitutional law that courts could compel executive branch officials to obey ministerial duties imposed upon them by Congress.²⁷⁰ The plain meaning of the mandatory statutory language at issue in ESA §7 establishes such ministerial duties, i.e., both (1) the action agencies’ duty to consult with the Secretary, and (2) the Secretary’s duty to offer the action agencies the Service’s wildlife expertise in “consult[ing]” with them and in “assist[ing]” them to fulfill their mandatory ESA §7 duty to avoid jeopardy to protected species.²⁷¹

And precisely who is this Secretary tasked with mandatory performance of these ministerial duties? Congress in ESA was quite explicit about that: “The term ‘Secretary’ means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970. . . .”²⁷²

266. *Id.* at 47736.

267. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194, 8 ELR 20513 (1978).

268. 5 U.S. (1 Cranch) 137 (1803) (holding that mandamus was proper remedy to compel Secretary of State to deliver commission to justice of peace for whom Congress had created five-year term of office; president had no power to authorize Secretary to omit performance of duties enjoined by law).

269. 37 U.S. (12 Pet.) 514 (1838) (holding that mandamus could be issued to compel Postmaster General to comply with statute requiring him to pay claimant settlement).

270. *See Marbury*, 5 U.S. (1 Cranch) at 166:

But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts . . . he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

See also Kendall, 37 U.S. (12 Pet.) at 524 (“To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.”); Harold H. Bruff, *Judicial Review and the President’s Statutory Powers*, 68 VA. L. REV. 1, 4 (Jan. 1982) (“Thus, *Marbury* laid the foundation of American administrative law by affirming both the power of Congress to limit the President’s discretion and the power of the courts to interpret and enforce those limits.”); *supra* note 268.

271. 16 U.S.C. §1536(a)(2).

272. *Id.* §1532(15) (then also providing “except that with respect to the enforcement of the provisions of this chapter and the Convention which pertain to the importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture”). *See* President Richard M. Nixon’s July 4, 1970, transmittal letter to Congress for Reorganization Plan No. 4, Reorganization Plan No. 4 of 1970, reprinted in 1970 U.S.C.C.A.N. 6325. (“The plan would transfer to the Secretary of Commerce various functions relating to the oceans and atmosphere, including commercial fishery functions, and would es-

Since in ESA §7 there were no other provisions made for the identity of the Secretary tasked with the mandatory duty of consultation with all other federal agencies,²⁷³ the “Secretary” who must perform that mandatory duty can be but the Secretary of the Interior or the Secretary of Commerce. Congress thus explicitly gave the duty of such consultation only to the Secretaries of the wildlife agencies and did not when it did so authorize their further delegation of that duty to any other “Secretary” or “Administrator” of any other federal agency.²⁷⁴

This point is but underscored by Congress’ explicit linking of the offices of the Secretary of the Interior and the Secretary of Commerce to how those Secretaries’ duties have since 1970 existed pursuant to President Richard M. Nixon’s Reorganization Plan Number 4. That is, Congress did not even assign the ESA §7 mandatory duty of consultation generically to these two “Secretary(s)” — but did so only with explicit reference to the particular tasks Congress had approved for them to fulfill in the last government reorganization affecting their departments.²⁷⁵ Thus, when Congress provided in ESA that action agencies “shall” consult with “the Secretary,” that mandatory duty of “consultation” with other federal agencies must be performed only by the Secretary of the Interior or the Secretary of Commerce. Congress did not in the ESA authorize those two Secretary(s) further to delegate that duty explicitly assigned in §7 only to them.

VI. Conclusion

A federal agency “has no constitutional or common law existence or authority, but only those authorities confirmed upon it by Congress.”

—*Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (citing *Marbury v. Madison*)

In promulgating two recent ESA joint counterpart consultation regulations, the wildlife agencies went beyond their

establish a National Oceanic and Atmospheric Administration in the Department of Commerce.”).

273. *But see* 16 U.S.C. §1537a(e), for example, where the Secretary of the Interior and the Secretary of State are together tasked with acting on behalf of the United States “in all regards as required by the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere.”

274.

If the laws, then, require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and were the President to perform it, he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself.

1 Op. Att’y Gen. 624, 625 (Oct. 20, 1823).

275. The president’s ability to reorganize governmental departments by means of proposals to increase the efficiency in administration was first granted in the late 1930s, 88 Stat. 1795, at 1804, and existed until it expired in the mid-1980s under President Ronald W. Reagan. Pursuant to this authority, presidential reorganization plans became effective after 60 days of submittal to Congress unless both houses of Congress passed a concurrent resolution disapproving them. But after the Supreme Court’s ruling in *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 13 ELR 20663 (1983), invalidated congressional reliance upon concurrent resolutions as not meeting constitutional requirements of bicameralism and presentment, the president’s reorganization plan authority expired at the end of 1984. *See* 5 U.S.C. §§901-912. It has not been renewed under a constitutionally permissible framework. *See generally* Harold C. Relyea, *Presidential Directives: Background and Overview*, CRS Report for Congress 13-14 (Jan. 7, 2005), available at <http://www.fas.org/irp/crs/98-611.pdf>.

delegated authority. Congress did not authorize them in ESA §7 to relinquish their statutorily bestowed role to share their expertise with action agencies undertaking proposed projects that may harm protected species—much less to acquiesce in allowing action agencies themselves to aggrandize this role.

In so doing, the wildlife agencies sought improperly to balance the strict ESA compliance Congress appointed them to facilitate for action agencies at the very point it often most matters—early in the process of deciding whether an action agency's proposed project may be likely to jeopardize the continued existence of protected species or their critical habitats. This is in fact the point at which the wildlife agencies' general regulations still require them either to bless the action agency's determination of no likely effects on protected species—thus ending any further ESA scrutiny—or to continue with much greater scrutiny to explore any likely adverse effects and consequent required mitigation measures.

Instead, in promulgating the challenged regulations, the wildlife agencies at times brought to their congressionally assigned task as expert ecological consultant too much emphasis on whether the wildlife agencies could, while adjusting mechanisms of ESA compliance, also facilitate the very different missions of action agencies implementing the national fire plan or the pesticides program. Because the wildlife agencies so allowed their primary delegated function as final arbiters of prohibited affects on protected species to be encroached upon or captured by the action agencies, enforcement of explicit mandates of the ESA has moved to the courts.

The early results of such judicial review are mixed. At present, they leave endangered and threatened species protected from FIFRA's—but not from NFP's—revised counterpart consultation provisions. Such results should be unacceptable to Congress, as well as to the wildlife agencies—Congress after all entrusted them with administering ESA, not FIFRA nor the NFP. In keeping with the strong protectionist mandates, policy, and purpose of ESA—as those have been consistently construed by the Supreme Court since *TVA*—the wildlife agencies should rescind the recent NLAA counterpart regulatory revisions to ESA's implementing regulations.

If they do not, Congress should intervene to clarify to the wildlife agencies their proper role in ESA enforcement: that

wildlife agencies, like all federal agencies, are but “creature[s] of statute.”²⁷⁶

Appendix

The schematics given below graphically depict:

(1) the existing ESA regulatory procedures that since 1986 all federal agencies were required to use to help insure that they fulfill their ESA §7(a)(2) mandatory duty to avoid jeopardy²⁷⁷ (Chart A depicts the NLAA general procedures—Chart B the formal general procedures)²⁷⁸; and

(2) the revised optional procedures that per the 2004 ESA/FIFRA counterpart regulations, may now be used by EPA when fulfilling its ESA §7(a)(2) mandatory duty to avoid jeopardy for regulatory actions under FIFRA (Chart C depicts the revised NLAA procedures—Chart D the revised “formal” procedures).²⁷⁹

The 2003 ESA/NFP joint counterpart consultation regulations were the first such revisions to the Services' prior existing regulatory framework for ESA §7 consultation established in 1986.²⁸⁰ The ESA/NFP counterpart regulations adopted analogous revisions for revised NLAA §7 consultation procedures as the subsequent 2004 ESA/FIFRA regulations did—leaving procedures for formal consultation unchanged.

Thus the ESA/NFP regulatory revisions to the Services' now-default §7 general consultation procedures are also graphically depicted on Chart C below—while those for the formal consultation still required for ESA/NFP actions remain the same as those graphically depicted on Chart B below.

276. *Michigan v. EPA*, 268 F.3d 1075, 1081, 32 ELR 20248 (D.C. Cir. 2001).

277. For ESA/FIFRA actions, these existing procedures remain—and are above termed—the “general” or “default” procedures. The former term is used by the court in the *Washington Toxics* case, *see supra* Part IV.B. The latter term is used by the *Kemphorne* court. *See supra* Part IV.C.

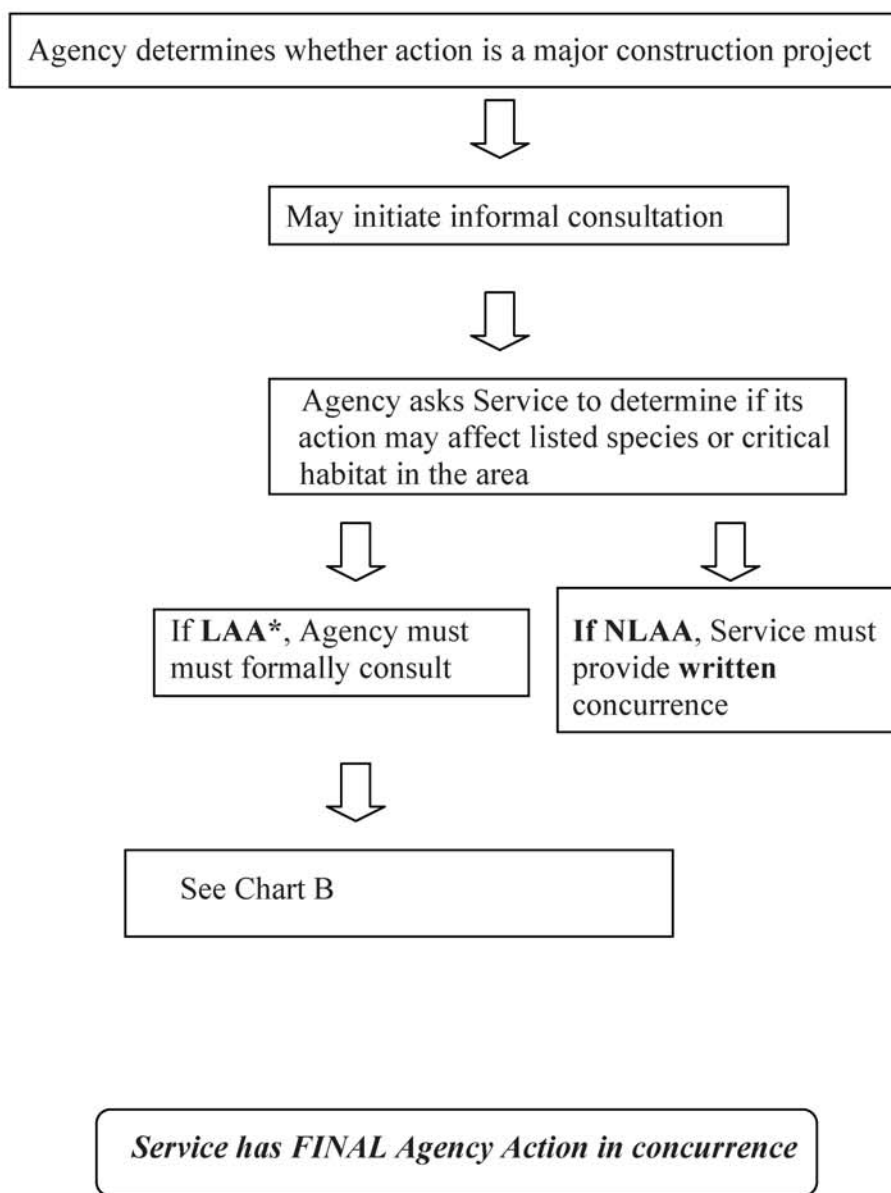
278. This chart depicts the general “formal” consultation procedures, whose relatively immediate legal “coercive effect” on the action agency is described immediately above in text and accompanying notes 86-89 discussing *Bennett v. Spear*, 520 U.S. 154, 169, 27 ELR 20824 (1997).

279. ESA/FIFRA Counterpart Regulations, 69 Fed. Reg. at 47732.

280. *See supra* note 4.

CHART A

Service/Agency “Not Likely To Adversely Affect” ESA Section 7 Consultation Process (Per 1986 Regulations)



***LAA** = “Likely to Adversely Affect” Protected Species

NLAA = “Not Likely to Adversely Affect” Protected Species

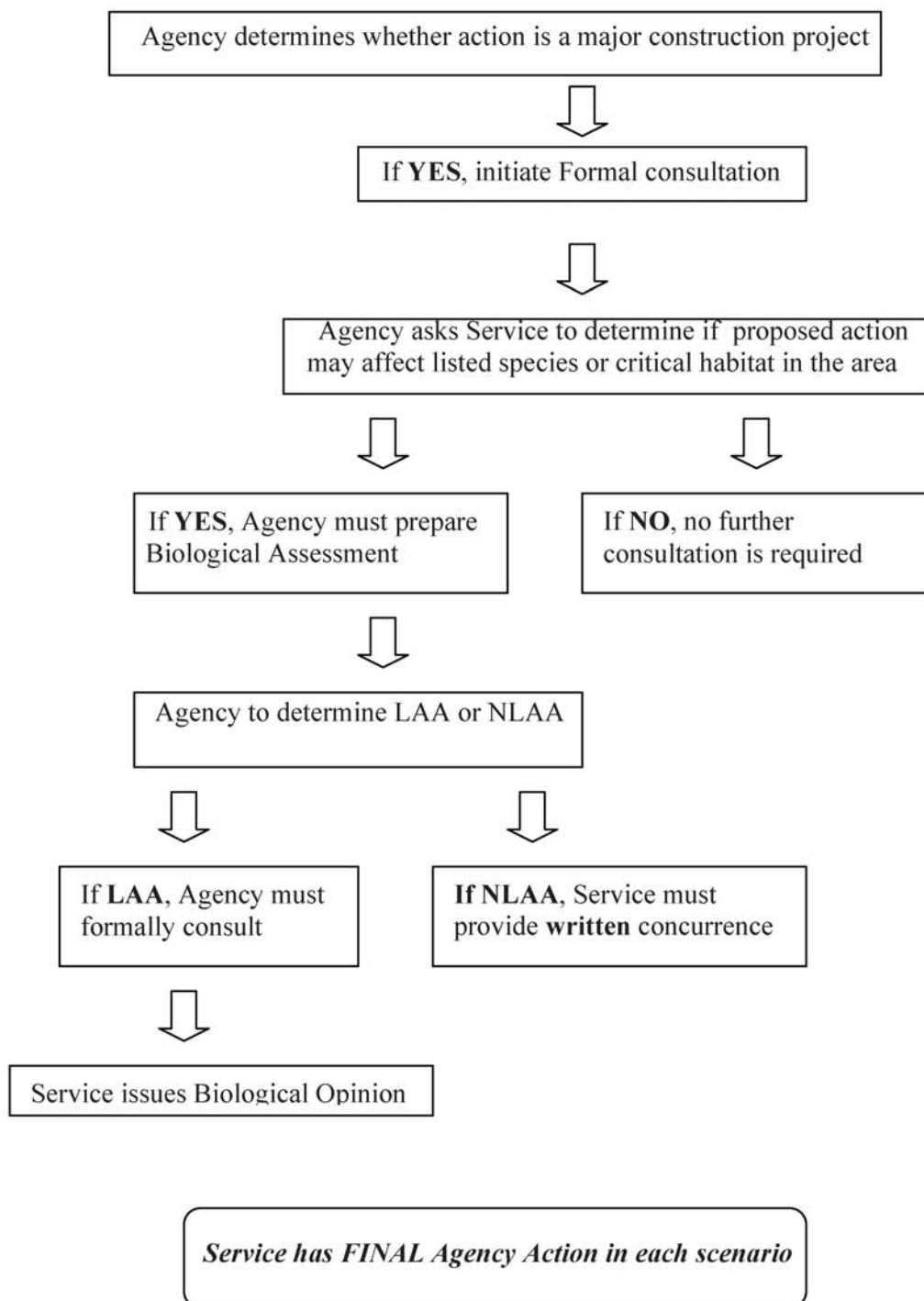
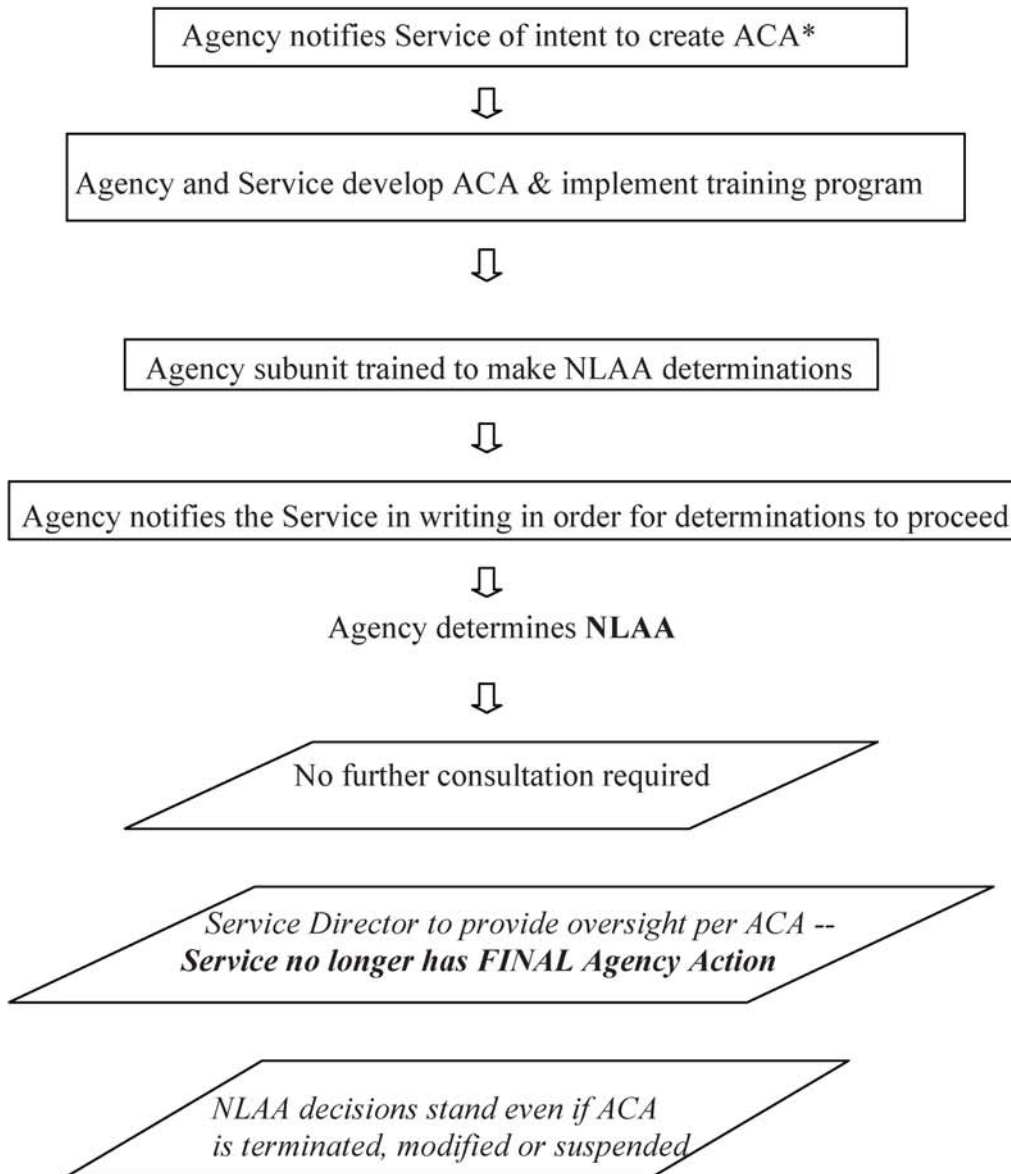
CHART B**Service/Agency Entire “Formal” ESA Section 7 Consultation
Process (Per 1986 Regulations)**

CHART C

Revised “Not Likely To Adversely Affect” ESA Section 7 Consultation Process (Per 2003/2004 Counterpart Regulations)



*ACA = Alternative Consultation Agreement

NLAA = “Not Likely To Adversely Affect” Protected Species

CHART D
Revised “Formal” ESA Section 7 Consultation Process
(Per 2004 Counterpart Regulations)

